TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 705.

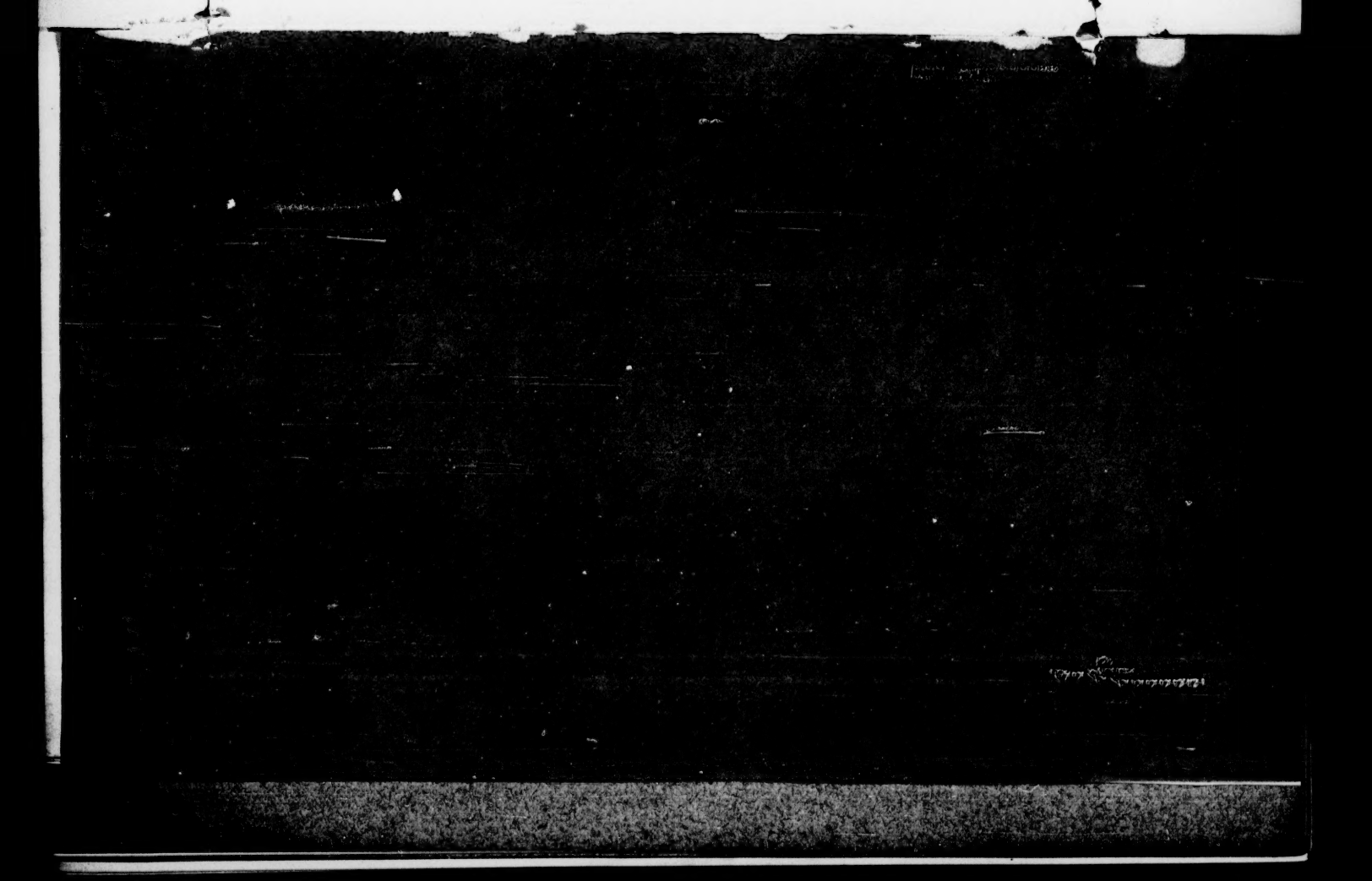
THE CITY COUNCIL OF ALEXANDRIA, PLAINTIFF IN ERROR,

vs.

ORLANDO FAIRFAX.

IN ERROR TO THE SUPREME COURT OF APPEALS OF THE STATE OF VIRGINIA.

FILED JUNE 2, 1877.



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1 To the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States.

The petition of the City Council of Alexandria showeth as follows:

On the 25th day of May, 1875, at a session of the Circuit Court of Alexandria, Virginia, in an action of covenant in said court pending, wherein Orlando Fairfax was plaintiff, and your petitioner was defendant, judgment was rendered in favor of your petitioner upon the facts agreed. Your petitioner, as his defence to said action, relied upon certain assignments of the stocks in controversy, by the marshal of the United States for the eastern district of Virginia, made pursuant to a decree of the district court of the United States for said district, entered in a suit in confiscation, under the act of Congress approved July 17th, 1862, entitled an act to suppress insurrection, to punish treason and rebellion, to seize and confiscate the property of rebels, and for other purposes." By this decree all the personal property mentioned in the libel in that cause (the stock sued on here) were confiscated and condemned as forfeited to the United States, and was ordered to be sold by

2 the marshal, and was sold and transferred. Your petitioner, therefore, relied upon the record of the confiscation proceedings as its complete and only defence to this action. The decision of said court was in favor of the validity of the confiscation proceedings, and adjudged that they constituted a valid defence to the action. Subsequently thereto, Orlando Fairfax, the plaintiff in this cause, the defendant in the confiscation proceedings, applied to the Supreme Court of Appeals of Virginia for a writ of error to said judgment, which was allowed, and the judgment of the circuit court was carried up to that court for review. On the 11th day of January, 1877, the Supreme Court of Appeals of Virginia rendered its decision reversing the judgment of the circuit court and giving judgment for the plaintiff for the value of the property seized and sold in the confiscation proceedings, and holding and adjudging that the confiscation proceedings referred to did not constitute a valid defence to the action, and were invalid. There was thus drawn in question the validity of an authority exercised under the United States, as will appear by the record, and the decision of the court of last resort in law and equity in Virginia was against

3 the validity of the authority thus exercised, all of which will appear by the record.

A transcript of the record in the supreme court of appeals is herewith exhibited.

Your petitioner, therefore, prays your honor to allow a writ of error to operate as a supersedeas to the said Supreme Court of Appeals of Virginia, being the highest court of law or equity of the State of Virginia in which a decision of the suit could be had, to bring up said record to the Supreme Court of the United States for

review, and for the correction of the errors apparent therein, according to the form and effect of the statute in such cases made and provided. Respectfully,

CITY COUNCIL OF ALEXANDRIA,
By CHARLES E. STEWART,
its Attorney.

Alexandria, Va., January 13th, 1877.

(Endorsement:) Orlando Fairfax vs. City Council of Alexandria. Petition. A writ of error may issue. M. R. W.

4 VIRGINIA:

Pleas before the Supreme Court of Appeals of Virginia, held at the state court-house in the city of Richmond, on Thursday the 11th day of January, A. D. 1877.

Be it remembered that heretofore, to wit, on the 16th day of November, 1875, came Orlando Fairfax, by his counsel, and filed his petition in this court for a writ of error and *supersedeas* to a judgment rendered by the Circuit Court of the City of Alexandria on the 25th day of May, 1875, in a suit in which the petitioner was plaintiff and the City Council of Alexandria was defendant, which writ was awarded by this court; and the said petition and the record of said judgment accompanying the same is in these words and figures, to wit:

5 In the Supreme Court of Appeals of Virginia. Richmond.

FAIRFAX
vs.
THE CITY COUNCIL OF ALEXANDRIA.

To the Honorable the Judges of the Supreme Court of Appeals of Virginia.

Your petitioner, O. Fairfax, respectfully shows that he is aggrieved by a final judgment of the Circuit Court for the City of Alexandria, rendered on the 25th day of May, 1875, in an action of covenant, wherein your petitioner was plaintiff and the City Council of Alexandria was defendant.

A transcript of the record and judgment complained of is herewith presented, by which it will appear that an action of covenant was instituted by your petitioner against the City Council of Alexandria to recover judgment on certain bonds, for the said corporation, held by your petitioner, and in his possession at the time suit was brought. For the facts of the case the court is referred to agreed statement.—(Page 11 of record.) The defence was that the said bonds had been confiscated as the property of your petitioner, and transferred to purchasers by the U. S. marshal, under and by authority of a sentence of condemnation and sale pronounced by J. C. Underwood, Judge of the District Court of the U. S. for the District of Virginia.

The question is, did the court have jurisdiction?

6 In order to give the district court jurisdiction, there should have been a valid seizure, and we contend that the record discloses merely a futile attempt on the part of the marshal to put under his control property which it was impossible to seize, because the bonds were in the possession of your petitioner and remained in his possession up to the time of bringing suit. They were not capable of manucaption, and could only be reached by way of attachment.—(*See Miller v. U. S.*, 11 *Wallace, pages* 268, 294, 295, 296, 297, 298.)

The process of garnishment was not pursued, but the marshal undertook to sell a mere *chose* in action, not in his possession, and incapable of being reduced to possession.

No notice was given to the debtor or holder; unless such notice is given there can be no seizure, and seizure is essential to the jurisdiction of the court. It must be shown affirmatively on the face of the record (and cannot be presumed) that the debtor was properly summoned to entitle the court to pass sentence on the subject if incapable of *manucaption*, and, if capable, that the *res* itself should be seized and remain in possession of the marshal.

The United State was pursuing a mere *credit* and not a chattel in existence, and as the authority under which the government acted was not according to the course of common law, but in derogation of it, the strictest particularity was required to give the court jurisdiction. The record of confiscation is produced in evidence, and it may be objected that we are attacking it collaterally, but who produces it? Not the purchaser whose title is not directly attacked, but the debtor of the plaintiff, the obligations being still in his possession and unpaid. The City Council of Alexandria was not a party or privy to the confiscation record; they were not even served with notice of the garnishment, for service on R. Johnson, auditor, is no good service on the corporation.

See Code of 1860, p. 707, ch. 70, § 7.

In this connection we call the attention of the court to page 15 of record, where it will appear that an attorney entered or attempted to enter his appearance in court to resist the final sentences of condemnation in Dr. Orlando Fairfax's cases, (for that was the effect of an order of reversal,) but he was told by the judge that he would allow no appearance for a rebel, and that he had ordered all such appearances to be stricken from the files, in other words, that such defendants had no standing in *his court.*

We contend that all proceedings under such an arbitrary, illegal, and oppressive rule were mere nullities, and that all sentences of condemnation afterwards made were simply void.—(*See Underwood v. McVeigh, 23rd Grattan, page* 409.)

In this case the action was ejectment, a collateral proceeding, yet the court, treating the condemnation as a nullity, held that the

marshal's deed passed no title, and decreed the case in favor
7 of McVeigh, the defendant in the libel of confiscation. In addition to the errors above mentioned, we assign the following:

1st. There was no order confirming the sale of the marshal and no order directing the marshal to make transfer of the bonds to the purchasers.

2d. There was no *judicial warrant to seize the property* nor any order of the court directing how it should be seized and disposed of. Proper seizure is essential to give jurisdiction.

3d. There was no rule of court directing how seizure should be made, and the instructions of the President were not followed.—(*See Miller's Case*, 11 *Wallace*, 274.) The United States was seeking to confiscate *a credit*, and, under the law of Virginia, garnishment was the only method to reach the subject. No proper notice was ever given to the debtor or holder (*see Miller's Case*, 11 *Wallace*, *page* 298), and, therefore, no valid seizure was ever made.

4th. The final order of the court provides for the execution of a deed for the *real estate*, though no *real estate* in this proceeding was *libeled*. The order should have been for the assignment of the bonds to the purchaser, if a valid seizure had been made.

5th. Because under the rule and practice in the District Court of the United States at Alexandria, as declared from the bench by the judge of said court, at the time Dr. Orlando Fairfax *was denied the rights and immunities guaranteed to him by the Constitution and laws of the United States.*

For these and other errors the petitioner prays for a writ of error to the judgment complained of.

THE PETITIONER,
By his Counsel, C. W. WATTLES.

I, C. W. Wattles, an attorney practicing in the Supreme Court of Appeals of Virginia, am respectfully of opinion that there is error in the judgment above complained of, and that it ought to be reviewed and reversed.

C. W. WATTLES.

Writ of error awarded, bond required in the penalty of $100.

8 VIRGINIA:

ORLANDO FAIRFAX
vs.
THE CITY COUNCIL OF ALEXANDRIA. } Covenant.

Pleas at the court-house of the city of Alexandria, before the circuit court of said city, on the 25th day of May, 1875.

Be it remembered that heretofore, to wit:

In the clerk's office of the Circuit Court of the City of Alexandria, on the 5th day of February, 1874, came the plaintiff, by his

attorney, and sued out a summons against the defendant, which summons, with the return thereon, is in the words and figures following, to wit:

Summons.

The Commonwealth of Virginia to the Sergeant of the city of Alexandria, greeting:

We command you to summon the City Council of Alexandria, if it be found within your bailiwick, to appear at the clerk's office of our Circuit Court for our said city of Alexandria, at the rules to be holden for said court, on the first Monday in March next, to answer Orlando Fairfax of a plea of covenant broken. Damages $15,000, and have then there this writ.

Witness Morton Marye, clerk of our said court, at the courthouse of said city, the 5th day of February, 1874, and in the 98th year of the commonwealth.

MORTON MARYE..

Return.

Executed the within summons by delivering a copy of the same to Wm. N. Berkley, Mayor of the city of Alexandria, Va., Feb'y 5th, 1874.

W. D. STEWART, *D. S.*
For JAS. M. STEWART, *Sergeant.*

9 *Continued.*

And at another day, to wit:

At rules held in the clerk's office of said court, on the first Monday in March, 1874.

This cause was continued for want of declaration.

And at another day, to wit:

At rules held in the clerk's office of said court, on the first Monday in April, 1874.

This day came the plaintiff by his attorney, and filed his certain declaration against the plaintiff of a plea of covenant broken; which declaration is in the words following, to wit:

Declaration.

VIRGINIA, Set.:

In the Circuit Court of the City of Alexandria.

Orlando Fairfax, plaintiff, complains of the City Council of Alexandria, defendant, which has been summoned, &c., of a plea of breach of covenant for this:

That the corporation of Alexandria, heretofore, to wit, on the 10th day of July, 1836, at Alexandria, to wit, at the city of Alexandria aforesaid, by its three several writings obligatory, signed by the mayor of said corporation, to wit, Thomas F. Mason, and by president of the council of said corporation, to wit, R. J. Taylor, and sealed with its seal, the date whereof is the day and year last aforesaid, covenanted and acknowledged that there was due from said corporation to Phineas Janney, as follow, to wit: by one of said writings obligatory, five hundred dollars, by another the sum of one thousand dollars ($1,000), and by the other the sum of two thousand dollars ($2,000), each of said sums bearing an interest of six per cent. per annum, payable half-yearly, on the 15th day of January and July in each year, being "stock" created in pursuance of an act of the Common Council of the Town of Alexandria, passed on the 9th day of July, 1836, and transferable by the said Phineas Janney, or his attorney, on the books of the corporation aforesaid, the principal of each of which is redeemable at the expiration of twenty-five years from the date thereof, to wit, from the 10th day of July, 1836. And the plaintiff saith the said writings obligatory were regularly and lawfully transferred on the books of the said corporation on the 23d day of November, 1858, to the said plaintiff, and that he has ever since that date, to wit, November 23d, 1858, been, and now is, the *bona fide* holder and owner of the same, to wit, of the one for $500 aforesaid, of the one for $1,000 aforesaid, and of the one for $2,000 as aforesaid.

And for this, also, that the Common Council of Alexandria, heretofore, to wit, on the 1st day of July, 1858, at the city aforesaid, by its certain writing obligatory, signed by W. D. Massey, mayor of Alexandria, and J. H. McVeigh, president of council of Alexandria, and sealed with the seal of said Common Council of Alexandria, covenanted and acknowledged that there was due unto and covenanted and promised to pay unto the plaintiff fifty-two hundred dollars, bearing interest at the rate of six per cent. per annum from the first day of July, 1858, payable half-yearly, said writing obligatory being stock issued in pursuance of an act of the Common Council of Alexandria, passed on the 23d day of July, 1845, the principal of which is redeemable on the 1st day of January, 1870, and is transferable only at the office of the auditor of the corporation in person or by his attorney. And the plaintiff saith that he has ever since the above-mentioned date, to wit, the 1st day of July, 1858, been, and now is, *bona fide* holder and owner of said writing obligatory for the sum of fifty-two hundred dollars.

And the said plaintiff avers that neither the said corporation of Alexandria nor the Common Council of the Town of Alexandria, nor the Common Council of Alexandria, nor the defendant, has paid to the plaintiff either of said sums of money or any part of either of them, or any part of the interest due on the same from the

1st day of July, 1861, although often requested, and although demand has been made for the same, according to the form and effect of its covenants in that behalf so made as aforesaid, but has hitherto wholly neglected and refused so to do, to wit, at the city of Alexandria, on the 20th day of February, 1874.

Wherefore, the said plaintiff saith that by reason of the said breaches of said covenants hereinbefore mentioned, and by virtue of the acts of the General Assembly of Virginia, a right of action hath accrued to said plaintiffs against the said defendant, and that by reason of the said breaches of said covenants as hereinbefore mentioned he has sustained damage to the amount of ($15,000) fifteen thousand dollars, and therefore he brings suit.

JNO. M. JOHNSON, p. q.
C. W. WATTLES,
MARSHAL & JOHNS.

11 *Conditional Judgment.*

And thereupon the defendant not appearing, though duly summoned, on motion of the plaintiff, by his attorney, it was ordered that judgment be rendered for the plaintiff against the defendant for what damages the plaintiff had sustained by the occasion of the breach of covenant in the declaration mentioned unless the said defendant should appear and plead to issue at the then next rules.

C. J. Confirmed.

And at another day, to wit:

At rules held in the clerk's office of the circuit court, on the 4th day of May, 1874, the defendant, the City Council of Alexandria, still failing to appear, on the motion of the plaintiff, by his attorney, it was ordered that the last order made against it in this cause be confirmed, and that the plaintiff's damages be ascertained by a jury at the then next term.

And at another day, to wit:

At a circuit court continued and held for the city of Alexandria, at the court-house of said city, on Thursday the 26th day of May, 1874.

This cause is continued generally to the next term, with leave to the defendant to plead within sixty days, and with a peremptory order for trial at that term.

And at another day, to wit:

At a circuit court continued and held for the city of Alexandria, at the court-house of said city, on Saturday the 26th day of September, 1874.

This day came the parties and filed a statement of agreed facts in this cause, and this cause is continued generally.

The following is a statement of agreed facts filed Sept. 26th, 1874, to wit:

Agreed statement of facts.

In the Circuit Court for the City of Alexandria.

O. Fairfax, plt'ff, vs. the City Council of Alexandria, def't.

This day came the parties by their attorneys, and a case
12 was agreed by them to be argued in lieu of a special verdict, in these words, to wit:

In February, 1864, Dr. Orlando Fairfax, the plaintiff in this suit, was residing in Richmond, Virginia, the capital of the Confederacy, and had been living there since the commencement of the war, having been up to said commencement a citizen and resident of the city of Alexandria, Virginia. He lived in Richmond till the close of the war, and whilst thus in Richmond, continuously during the period mentioned within the Confederate lines, he held four bonds, or evidenced of indebtedness of the city of Alexandria, one for $2,000, one for $500, one for $1,000, and one for $5,200, all bearing interest at the rate of six per centum per annum on their face, the three first being due and payable on July 10th, 1861, the last one ($5,200) being due and payable January 1, 1870.

At no time during the war were these bonds or evidences of indebtedness out of the personal possession and custody of Orlando Fairfax, the plaintiff in this cause, in the city of Richmond, Virginia. The bonds aforesaid in the declaration mentioned, were in the words and figures following: (See page 45 of this record, copy of bonds and endorsements.)

Three of which bonds had been regularly and properly assigned, and transferred to Dr. Orlando Fairfax, the plaintiff in this cause, on the books of the corporation, for value, and had passed into his possession and ownership on the 23d day of November, 1858, and the fourth one for $5,200, due January 1st, 1870, and bearing interest from July 1st, 1858, and numbered 35, was made and executed and delivered to him in his own name by the defendant for value received.

That on the 30th day of November, 1866, the said plaintiff served a notice on the auditor of the said defendant, who was authorized as agent of said defendant to pay the interest on said bonds whenever it fell due, not to pay any interest which should thereafter accrue to any but himself, or his authorized attorney. That prior to the commencement of this suit and subsequent to January 1st, 1870, the plaintiff by his authorized attorney and agent, John Johns, Jr., repeatedly demanded of the defendant the payment of the principal of said bonds, and the accrued interest thereon, and payment of the same was refused by defendants, and the said amounts have never been paid to the plaintiff.

That on the 25th day of July, 1865, the plaintiff received and accepted the pardon of the President of the United States.

13 *Pardon.*

Andrew Johnson, President of the United States of America, to all to whom these presents shall come, greeting:

Whereas O. Fairfax, of Alexandria, Virginia, by taking part in the late rebellion against the government of the United States, has made himself liable to heavy pains and penalties; and whereas the circumstances of his case render him a proper object of executive clemency:

Now, therefore, be it known that I, Andrew Johnson, President of the United States of America, in consideration of the premises, divers and other good and sufficient reasons me thereunto moving, do hereby grant to the said O. Fairfax a full pardon and amnesty for all offences by him committed, arising from participation, direct or implied, in the said rebellion, conditioned as follows, viz: this pardon to begin and take effect from the day on which the said O. Fairfax shall take the oath prescribed in the proclamation of the President dated May 29th, 1865, and to be void and of no effect if the said O. Fairfax shall hereafter, at any time, acquire any property whatever in slaves or make use of slave labor; and that he first pay all costs which may have accrued in any proceedings hitherto instituted against his person or property.

And upon the further condition that he, said O. Fairfax, shall notify the Secretary of State, in writing, that he has received and accepted the foregoing pardon.

In testimony whereof I have hereunto signed my name, and caused the seal of the United States to be affixed.

Done at the city of Washington, this twenty-fifth day of July, A. D. 1865, and of the independence of the United States the ninetieth.

[SEAL.] ANDREW JOHNSON.

By the President.

WILLIAM H. SEWARD,
Secretary of State.

PROVOST MARSHAL'S OFFICE,
RICHMOND, VA., *July 18th*, 1865.

No. 314.

I do hereby certify that on the 18th day of July, 1865, at Richmond, Va., the oath prescribed by the President of the United
14 States in his proclamation of May 29th, 1865, was duly taken, subscribed, and made matter of record by Orlando Fairfax, of Richmond, Va., at capitol building, Richmond.

E. B. TOWNSEND,
Lieut. and Ass't Provost Marshal.

That between March 14th and April 11th, 1864, an attorney-at-law appeared before Jno. C. Underwood, Judge of the District Court of the United States for the District of Virginia, at Alexandria, as counsel, and endeavored to procure from him a reversal of the decree of confiscation entered in favor of the United States against Dr. Orlando Fairfax's (the plaintiff in this cause) house and lot situated on Cameron street in the city of Alexandria. The judge, the Hon. Jno. C. Underwood, informed the attorney from the bench that he could allow no appearance for any "rebel" or "traitor," that this was the rule of his court as before that publicly announced, and that he had in every case ordered the appearance of counsel for, and the answer of, "rebels" to be stricken from the files. The records of three confiscation cases tried in the United States District Court for the District of Virginia, before the said Jno. C. Underwood as judge, between March 10th, 1864, and May 4th, 1864, in which the United States was plaintiff and Dr. Orlando Fairfax (the plaintiff in this cause) was defendant, show that in each case the above rule and practice of the court, as proven by said attorney, that is to allow no appearance for any "rebel" or "traitor," was carried out against Dr. Orlando Fairfax, the defendant in these cases and the plaintiff in this, and that the appearance of his attorney and his answers in those three causes, tried and determined between March 10th, 1864, and May 4th, 1864, were by order of said United States district court at Alexandria stricken from the files, on the ground that said Dr. Orlando Fairfax was within the Confederate lines and a rebel.

That the aggregate or principal of said bonds is $8,700, upon which interest has accrued as to $3,500 thereof from January 15, 1867, and on $5,200 thereof from July 1, 1867, on each sum at the rate of six per centum per annum. That on the 4th day of May, 1864, the United States District Court for the District of Virginia, in a cause in confiscation therein pending (but not one of the confiscation causes heretofore referred to) in the name of the "United States *vs.* All the rights, title, and interest of Dr. Orlando Fairfax in and to eighty-seven shares of the stock of the corporation of Alexandria, in the eastern district of Virginia, together with all the moneys due him and becoming due from the said corporation for dividends upon said stock," passed a sentence
15 of condemnation, condemning said stock as forfeited to the United States, the record of which sentence is in the words and figures following, to wit:

Record of Sentence of Condemnation.

To the judge of the District Court of the United States for the Eastern District of Virginia.

This is a libel of information of L. H. Chandler, United States attorney for the eastern district of Virginia, in behalf of the gov-

ernment of the United States against all the right, title, and interest of Dr. Orlando Fairfax in and to eighty-seven shares of the stock of the corporation of Alexandria, in the eastern district of Virginia, together with all the moneys due him and becoming due from the said corporation for dividends upon said stock, together with all his right, title, and interest in and to the improvements, buildings, rights, privileges, appurtenances, and other hereditaments to the same belonging or in anywise appertaining, and against all persons lawfully intervening for their interest therein.

And thereupon the said L. H. Chandler, United States attorney, as aforesaid, doth allege and articulately propound as follows:

I. That certain states, forming a part of the territory and constituting a part of the government of the United States, and specifically enumerated by the President of the United States in his proclamation, duly issued, and bearing date the 1st day of July, A. D. eighteen hundred and sixty-two, are engaged in armed rebellion against the lawful authority of the United States.

II. That, by the act of the Congress of the United States, approved the seventeenth day of July, in the year of our Lord one thousand eight hundred and sixty-two, entitled "An act to suppress insurrection, punish treason and rebellion, to seize and confiscate the property of rebels, and for other purposes," provision was made for the seizure and confiscation of the property of her sons engaged in armed rebellion against the lawful authority of the United States, as therein set forth.

III. That the President of the United States did, on the 25th day of July, in the year of our Lord eighteen hundred and sixty-two, issue his proclamation warning all persons within the contemplation of the sixth section of the said act of Congress of July 17, A. D. 1862, to cease from participating in, aiding, countenancing, and abetting the existing rebellion against the government of the United States, as provided for by said act.

IV. That Dr. Orlando Fairfax, on the said seventeenth day of July, in the year of our Lord one thousand eight hundred and sixty-two, was, and previously thereto had been, the owner of eighty shares of the stock of the corporation of Alexandria, de-
16 scribed as follows: All his right, title, and interest in and to eighty-seven shares of the stock of the corporation of Alexandria, in the eastern district of Virginia, together with all the moneys due him and becoming due from said corporation for dividends upon said stock, together with all the improvements, buildings, rights, privileges, appurtenances, and other hereditaments to the same belonging or in anywise appertaining.

V. That the said Dr. Orlando Fairfax, subsequently to said seventeenth day of July, in the year of our Lord one thousand eight hundred and sixty-two, held and exercised an office and agency of honor, trust, and profit under the government of the so-called Con-

federate States, and under one of the said several states of said Confederacy, and under the laws thereof, and that the said Dr. Orlando Fairfax accepted the appointment and was elected to said office and agency after the date of the pretended ordinance of said state, and did take an oath of allegiance to and to support the constitution of the so-called Confederate States.

VI. That the said Dr. Orlando Fairfax, owning property in the said city of Alexandria, as aforesaid, has, since the said seventeenth day of July, in the year of our Lord one thousand eight hundred and sixty-two, assisted and given aid and comfort to the rebellion and to those engaged in the rebellion against the lawful authority and against the government of the United States, in this: that the said Dr. Orlando Fairfax did, on the eighteenth day of July, in the year of our Lord one thousand eight hundred and sixty-two, and at various other times between that date and the date of the filing of this libel of information, give aid and comfort to said rebellion by acting as a soldier and as an officer and as a non-commissioned officer in the army and navy of the so-called Confederate States, and by contributing money and property to the aid and encouragement of those engaged in the rebellion against the lawful authority of the United States and to the government of the so-called Confederate States.

VII. That the said Dr. Orlando Fairfax, on the eighteenth day of July, in the year of our Lord one thousand eight hundred and sixty-two, was engaged in armed rebellion against the government of the United States and in aiding and abetting such rebellion, and notwithstanding that the President of the United States, on the 25th day of July, eighteen hundred and sixty-two, did issue his proclamation, as aforesaid, warning all persons within the contemplation of the sixth section of the act of Congress of July the seventeenth, eighteen hundred and sixty-two, to cease participating in, aiding, countenancing, and abetting such rebellion, the said Dr. Orlando Fairfax did not, within sixty days after said proclamation was duly given and made, cease to aid, countenance, and abet such rebellion, and did not return to his allegiance to the United States.

VIII. That the said property herein described has been
17 seized by the United States Marshall for the District of Virginia, in compliance with instructions issued by the Attorney-General to district attorneys of the United States, and by virtue of the fifth section of the act approved on the seventeenth day of July, in the year of our Lord one thousand eight hundred and sixty-two, entitled "An act to suppress insurrection, to punish treason and rebellion, to seize and confiscate the property of rebels, and for other purposes."

IX. That by reason of the premises, the property herein described became and was forfeited to the United States, and ought to be condemned to their use.

Wherefore, prayer is hereby made to your honor that process of monition may issue against the owner and owners of the property herein described, and against all persons interested or claiming an interest therein, warning them at some early day, to be therein named, to appear and answer this libel of information, and the owner of said property being absent, and non-resident, prayer is further made for order of publication in the usual form, and for such further and other relief as to law and justice may appertain, and as this court is competent to give in the premises.

L. H. CHANDLER,
U. S. Attorney.

(Endorsed:) No. 88. U. S. District Court for Eastern Virginia, at Alexandria, Va. United States vs. All the right, title, and interest of Dr. Orlando Fairfax. Libel of information. Filed February 24th, 1864. W. H. Barry, clerk.

OFFICE U. S. DISTRICT ATTORNEY
FOR THE EASTERN DISTRICT OF VIRGINIA,
ALEXANDRIA, VA., *22d February*, 1864.

To the Marshal of the United States, for the Eastern District of Virginia.

In compliance with general instructions, issued by the At-
18 torney-General, under the act of July 17th, 1862, entitled "An act to suppress insurrection, to punish treason and rebellion, to seize and confiscate the property of rebels, and for other purposes,"

I have to direct that you seize all the right, title, and interest of Dr. Orlando Fairfax, in and to eigty-seven shares of the stock of the corporation of Alexandria, in the eastern district of Virginia, together with all the moneys due him, and becoming due from the said corporation for dividends upon said stock, together with all the improvements, buildings, rights, privileges, appurtenances and other hereditaments to the same belonging, or in anywise appertaining, and all right, title, interest, and estate of Dr. Orlando Fairfax therein, as proceedings are to be instituted to secure the *consider*-ation of the same to the use of the United States, under the above-entitled act.

You will report the seizure to me when the same shall have been made.

L. H. CHANDLER,
U. S. District Attorney.

(Endorsed as follows:) No. 88. Order of seizure. Dr. Orlando Fairfax.

UNITED STATES MARSHAL'S OFFICE,
ALEXANDRIA, VA., *Feb. 23d*, 1864.

I certify that I have seized the within described property, and

given notice to R. Johnson, Esq., auditor of the corporation of Alexandria, as within directed.

JOHN UNDERWOOD,
U. S. Marshal.

Filed Feb'y 24th, 1864.

W. H. BARRY, *Clerk.*

19 District Court of the United States for the Eastern District of Virginia.

The United States
vs.
All the right, title, and interest of Dr. Orlando Fairfax, in and to eighty-seven shares of the stock of the corporation of Alexandria, in the eastern district of Virginia, together with all the moneys due him, and becoming due from the said corporation for dividends upon said stock. } Confiscation.

On reading and filing the libel in this case the court orders that process of monition issue, as prayed, and appoints the first Monday in April, 1864, and the court-room in the custom-house, in the city of Alexandria, as the time and trial of this cause; and also orders that notice of said time and place of trial, and of the substance of the said libel, be given by publication thereof in the *Virginia State Journal*, a newspaper published in the city of Alexandria, and also by posting up the same at the court-house door; and that proclamation of the pendency of this suit be made by the marshal at the court-house door two times weekly, until the day of trial.

JOHN C. UNDERWOOD,
District Judge.

(Endorsed as follows:) No. 88. United States vs. All the right, title, &c., Dr. Orlando Fairfax. Order for process, &c. Returnable 1st Monday, Ap'l, 1864. Filed and entered Feb'y 26, 1864. W. H. Barry, district clerk.

The President of the United States to the Marshal for the Eastern District of Virginia.

You are hereby commanded to give public notice at least fourteen days before the day of trial hereinafter mentioned, by advertisement in the *Virginia State Journal*, a newspaper published in the city of Alexandria, and by posting up a notification at the court-house door twice a week till the day of trial aforesaid, that L. H. Chandler, attorney of the United States for said district, has caused all the right, title, and interest of Dr. Orlando Fairfax in and to eighty-seven shares of the stock of the corporation of Alexandria, in the eastern district of Virginia, together with all the moneys due him, and becoming due from the said corporation for

20

dividends upon said stock, to be seized by you as forfeited to the United States. That he did, on the 24th day of February, 1864, file in the clerk's office of said district court a libel of information on behalf of the United States against the said stock, and against all persons lawfully intervening for their interest therein, and for the causes in said libel set for then, praying for condemnation of the same to the use of the United States, and that said court has appointed the first Monday of April, 1864, and the court-room in the said city, as the time and place for the trial of said cause, when and where all persons interested in said stock, or claiming an interest therein may appear and make their allegations in that behalf.

Herein fail not, and make return of this warrant into said clerk's office without delay, so endorsed as to show the time and manner of its execution by you.

Witness the Honorable John C. Underwood, United States District Judge for the Eastern District of Virginia, this 26th day of February, A. D. 1864.

[SEAL.] W. H. BARRY, *Clerk.*

(Endorsed:) United States vs. All the right, &c., Dr. Orlando Fairfax. Motion. Returnable 1st Monday, April, 1864. Issued Feb'y 26, '74. Alexandria, Va., April 4, 1864.

I certify that I have caused the notice to be published, posted, and proclaimed as within commanded.

JOHN UNDERWOOD, *U. S. Marshal.*
Pr. W. A. DUNCAN, *Deputy.*

21 District Court of the United States for the Eastern District of Virginia.

To Dr. Orlando Fairfax, and to all whom it may concern, greeting:

Notice is hereby given, that on the 23rd day of February, 1864, all the right, title, and interest of Dr. Orlando Fairfax, in and to eighty-seven shares of the stock of the corporation of Alexandria, in the eastern district of Virginia, together with all the moneys due him, and becoming due from the said corporation, for dividends upon said stock was seized by the marshal of the United States for said district as forfeited to the use of the United States, and the same is libeled and prosecuted in this court in the name of the United States, for condemnation for the causes in the said libel set forth, and said cause will stand for trial at the court-room in the city of Alexandria, on the first Monday of April next, when and where all persons are warned to appear to show cause why condemnation should not be decreed, and to intervene for their interest.

W. H. BARRY, *Clerk.*

Dated February 26, 1864.

(Endorsed:) Filed Feb'y 26, 1864. W. H. Barry, clerk.

District Court of the United States for the Eastern District of Virginia.

David Turner, of the city and county of Alexandria, being duly sworn, deposes and says that he is the publisher and proprietor of the *Virginia State Journal*, a daily newspaper published in the city of Alexandria, and that a notice of which the annexed is a true and correct copy, was published in said newspaper 14 days prior to the 4th day of April, 1864, the first insertion being on the 27th day of Feb'y, 1864, and the last on the 12th day of March, 1864.

DAVID TURNER.

Fees for publication.

Subscribed and sworn to before me, this 4th day of April, 1864.

W. H. BARRY, *Clerk.*

22 No. 88.

District Court of the United States for the Eastern District of Virginia.

To Dr. Orland Fairfax, and to all whom it may concern, greeting:

Notice is hereby given, that on the 23rd day of February, 1864, all the right, title, and interest of Dr. Orlando Fairfax, in and to eighty-seven shares of the stock of the corporation of Alexandria, in the eastern district of Virginia, together with all the moneys due him, and becoming due from the said cerporation for dividends upon said stock, was seized by the marshal of the United States for said district as forfeited to the use of the United States, and the same is libeled and prosecuted in this court, in the name of the United States, for condemnation for the causes in the said libel set forth, and that said cause will stand for trial at the court-room in the city of Alexandria, on the first Monday of April next, when and where all persons are warned to appear to show cause why condemnation should not be decreed, and to intervene for their interest.

W. H. BARRY, *Clerk.*

Dated February 26th, 1864.

(Endorsed:) No. 88. Filed April 4th, 1864. W. H. Barry, c'lk.

At a special term of the District Court of the United States of America for the Eastern District of Virginia, held at the court-room in the custom-house building in the city of Alexandria, on Wednesday the 4th day of May, in the year of our Lord one thousand eight hundred and sixty-four.

Present, the Honorable John C. Underwood, District Judge.

No. 88.

United States
vs.
All the right, title, and interest of Dr. Orlando Fairfax in and to eighty-seven shares of the stock of the corporation of Alexandria, in the eastern district of Virginia, together with all the moneys due him, and becoming due from the said corporation, for dividends upon said stock.

23 The papers in this cause having been theretofore returned, the usual proclamation having been made, the default of all persons being duly entered, and due deliberation being had on the pleadings, it is thereupon, on motion of L. H. Chandler, attorney for the United States, ordered, adjudged, sentenced, and decreed by the court, that the personal property mentioned and described in the libel in this cause be, and the same accordingly is, confiscated and condemned as forfeited to the United States.

And upon like motion it is further ordered, adjudged, and decreed that the clerk of this court issue a decree of *venditioni exponas* to the marshal of the district, returnable according to law, and that the said marshal, after having given at least ten days' notice of the time, place, and terms of sale, by publication thereof in one or more newspapers published in the city of Alexandria, sell the said property at public sale, for cash, to the highest bidder, and execute a deed for the real estate to the purchaser, and bring the proceeds of said sale into this court for its action thereon.

JOHN C. UNDERWOOD,
Dist. Judge.

(Endorsed:) No. 88. Filed and entered May 4, 1864. W. H. Barry, clerk.

UNITED STATES OF AMERICA,
EASTERN DISTRICT OF VIRGINIA. } *ss.*

The United States of America to the Marshal of the Eastern Dis- of Virginia, greeting:

Whereas, a libel was filed in the District Court of the United States for the Eastern District of Virginia, at Alexandria, on the 24th day of February, in the year of our Lord one thousand eight hundred and sixty-four, by L. H. Chandler, United States district attorney for said district, against all the right, title, and interest of Dr. Orlando Fairfax in and to eighty-seven shares of the stock of the corporation of Alexandria, in the eastern district of Virginia, together with all the moneys due him and becoming due from the said corporation for dividends upon said stock, praying that the same may be condemned and sold for the causes on the said

24 libel alleged. And whereas the said stock and dividends *has* been attached by the process issued out of the said district

court in pursuance of said libel, and is now in custody by virtue thereof, and such proceedings have been thereupon had, that by the decree of the said court on this cause, made and pronounced on the 4th day of May, in the year of our Lord one thousand eight hundred and sixty-four, the said stock and dividends *was* condemned, and said stock ordered to be sold by you, the said marshal, after giving ten days' notice of such sale according to law, by publication thereof in the *Virginia State Journal*, published in the city of Alexandria.

Therefore you, the said marshal, are hereby commanded to cause the eighty-seven shares of the stock of the corporation of Alexandria, in the eastern district of Virginia, so condemned and ordered to be sold, to be sold, in the manner and form, upon the notice, and at the time, place, and upon the terms by law required, and that you have the money accruing from said sale in said court, at Alexandria, on the 1st day of August, eighteen hundred and sixty-four, and that you then pay the same to the clerk of the court. And have you then and there this writ.

Witness the Hon. John C. Underwood, judge of the said court, at the city of Alexandria, in the eastern district of Virginia, this 24th day of June, in the year of our Lord one thousand eight hundred and sixty-four, and of our independence the eighty —.

[SEAL.] W. H. BARRY, *Clerk.*

Return.

Sold July 19, '64	$1,737 00
Fees and commissions	63 74
	$1,673 26

Paid gross amount to clerk and received fees and expenses as per statement above.

JOHN UNDERWOOD, *U. S. M.*
Per W. A. DUNCAN, *Deputy.*

25 (Endorsed :) No. 88. District Court of the United States Eastern District of Virginia. The United States vs. All the right, title, &c., Dr. Orlando Fairfax. Vend. exp. Decree rendered May 4, A. D. 1864. Ret. day, Aug't 1, 1864.

No. 88.

United States District Court, Eastern District of Virginia, Clerk's Office.

IN THE MATTER OF UNITED STATES
vs.
ALL THE RIGHT, TITLE, &C., OF DR. ORLANDO FAIRFAX, to 87 shares of stock of corporation of Alexandria. } In

EASTERN DISTRICT OF VIRGINIA, *ss.*

I hereby certify that the accompanying is a true and correct copy

of the original papers in the above-entitled cause now on file in this office.

In witness whereof I have hereunto set my hand and affixed the seal of the said court, at the city of Richmond, in said district, this 11th day of May, A. D. 1874.

JOHN R. POPHAM,
[SEAL.] *Clerk U. S. D. C., Eastern Dis'ct. Va.*

United States District Court, Eastern District of Virginia.

EASTERN DISTRICT OF VIRGINIA, *ss.*

I, Ro. W. Hughes, judge of the District Court of the United States for the Eastern District of Virginia, do certify that
26 John R. Popham, who hath given the foregoing certificate, is clerk of said court, and that his said attestation is in due form.

In witness whereof I have hereunto set my hand, this 11th day of May, A. D. 1874.

R. W. HUGHES, *Disirict Judge.*

The said eighty-seven shares of stock mentioned and described in said record are the shares or bonds evidenced by the certificates or bonds which are heretofore set forth, and which form the basis of the present action. Under said sentence of condemnation the said stock was sold by the marshal of the said district, and by him the said stock so sold was transferred on the books of the auditor of the corporation to the purchasers respectively.

Transfers of Stock.

Said transfers are in the words and figures following:

ALEXANDRIA, *August* 1*st*, 1864.

For value received, I do hereby assign and transfer to Dr. L. W. Webb, two thousand dollars of the stock of the corporation of Alexandria (of July 9, 1836), now standing in the name of Dr. O. Fairfax, the same having been sold to said Webb under an order of the District Court of the U. S. for the Eastern District of Virginia, as confiscated property.

JOHN UNDERWOOD,
U. S. Marshal, District of Virginia.

ALEXANDRIA, *August* 1*st*, 1864.

For value rec'd, I do hereby assign and transfer to William A. Duncan, two thousand dollars of the stock of the corporation of Alexandria (of July 23rd, 1845), now standing in the name of Dr. O. Fairfax, the same having been sold to said Duncan under an order of the District Court U. S. for the Eastern District of Virginia, as confiscated property.

JOHN UNDERWOOD,
U. S. Marshal, District of Virginia.

27 ALEXANDRIA, *August* 1*st*, 1864.

For value rec'd, I do hereby assign and transfer to Charles A. Gregory, one thousand dollars (of July 9th, 1836, $500, and July 23rd, 1845, $500), now standing in the name of Dr. O. Fairfax, the same having been sold said Gregory under an order of the District Court of U. S. for the Eastern District of Virginia, as confiscated property.

JOHN UNDERWOOD,
U. S. Marshal, District of Virginia.

ALEXANDRIA, *August* 1*st*, 1864.

For value rec'd, I do hereby assign and transfer to J. B. Williamson, one thousand dollars of the stock of the corporation of Alexandria (of July 9th, 1836), now standing in the name of Dr. O. Fairfax, the same having been sold to said Williamson under an order of the District Court U. S. for the Eastern District of Virginia, as confiscated property.

JOHN UNDERWOOD,
U. S. Marshal, District of Virginia.

ALEXANDRIA, *August* 1*st*, 1864.

For value rec'd, I do hereby assign and transfer I. G. Verplank, twenty-seven hundred dollars of the stock of corporation of Alexandria (of July 23rd, 1845), now standing in the ——— Dr. O. Fairfax, the same having been sold to said Verplank under an order of the District court U. S. for the Eastern District of Virginia, as confiscated property.

JOHN UNDERWOOD,
U. S. Marshal, Dist. of Virginia.

The said transfers have been recognized by the defendants as valid transfers of said stock, and the defendants have issued to said confiscation purchasers, or to their assigns, certificates of stock of like tenor and amount, which are still outstanding, the several charters of the town and city of Alexandria, Va., and the ordinances of said town and city are made part of this agreed statement, the same as if embodied herein at length.

28 And it is further agreed that if from the facts stated above the law shall be in favor of the plaintiff, the court shall enter judgment for the amount and interest above stated. But if the court shall determine that the law is for the defendant, judgment shall be entered accordingly.

JNO. JOHNS, JR.,
C. W WATTLES,
JOHN W. JOHNSTON,
For plaintiff.
CHARLES E. STUART,
S. F. BEACH,
For defendant.

The following are copies of the bonds and endorsements referred to in the agreed statement of facts:

No. 35. Alexandria Corporation Stock, $5,200.

There is due from the Common Council of Alexandria unto Dr. Orlando Fairfax, fifty-two hundred dollars, bearing interest at the rate of six per cent. per annum from the first day of July, 1858, payable half-yearly, being stock issued in pursuance of an act of the Common Council of Alexandria, passed on the 23rd day of July, 1845, the principal of which is redeemable on the 1st day of January, in the year eighteen hundred and seventy, and is transferable only at the office of the auditor of the corporation in person or by attorney.

Witness the seal of the Common Council of Alexandria.

W. D. MASSEY, *Mayor.*
J. H. McVEIGH,
President of Council.

{ Alexandria Corporation. }

SAM. J. McCORMICK, *Auditor.*

No. 39. Tenth day of July, 1836.

Alexandria Corporation Stock.

Be it known there is due from the corporation of Alexandria unto Phineas Janney, five hundred dollars, bearing an interest
29 of six per cent. per annum, payable half-yearly, on the 15th day of January and July in each year, being stock created in pursuance of an act of the Common Council of the town of Alexandria, passed on the 9th day of July, 1836, and transferable by the said Phineas Janney, or his attorney, on the books of the corporation, the principal of which is redeemable at the expiration of twenty-five years from the date hereof.

Witness the seal of the corporation.

[Seal of corporation.] THOMSON F. MASON,
Mayor.

R. JOHNSTON, Jr., *Auditor.* R. J. TAYLOR,
President of Council.

Transferred to Tho. Fairfax, April 4, 1839.
R. JOHNSTON, Jr., *Auditor.*

Nov. 23d, 1858.
Transferred to Dr. O. Fairfax.
SAM'L J. McCORMICK, *Aud.*

No. 6. Tenth day of July, 1836.

Alexandria Corporation Stock.

Be it known there is due from the corporation of Alexandria unto Phineas Janney, two thousand dollars, bearing an interest of six per

cent. per annum, payable half-yearly, on the 15th day of January and July in each year, being stock created in pursuance of an act of the Common Council of the town of Alexandria, passed on the 9th day of July, 1836, and transferable by the said Phineas Janney, or his attorney, on the books of the corporation, the principal of which is redeemable at the expiration of twenty-five years from the date hereof.

Witness the seal of the corporation.

{ Alexandria } THOMPSON F. MASON, *Mayor.*
{ Corporation Seal. } R. J. TAYLOR,
President of Council.

R. JOHNSTON, JR., *Auditor.*

30 (Endorsed:) Transferred to Tho. Fairfax, April 4, 1837. R. Johnston, Jr., Aud. Nov. 23, 1858. Transferred to Dr. O. Fairfax. Sam. J. McCormick, Aud.

No. 11. Tenth day of July, 1836.

Alexandria Corporation Stock.

Be it known there is due from the corporation of Alexandria unto Phineas Janney, one thousand dollars, bearing an interest of six per cent. per annum, payable half-yearly, on the 15th day of January and July in each year, being stock created in pursuance of an act of *the act of* the Common Council of the town of Alexandria, passed on the 9th day of July, 1836, and transferable by the said Phineas Janney, or his attorney, on the books of the corporation, the principal of which is redeemable at the expiration of twenty-five years from the date hereof.

Witness the seal of the corporation.

[Seal of Corporation.] THOMAS F. MASON, *Mayor.*
R. L. TAYLOR, *President of Council.*

R. JOHNSTON, JR., *Auditor.*

Transferred to Tho. Fairfax, Ap'l 4 1837.
R. JOHNSTON, JR., *Aud.*

Transferred to Mrs. Eliza Mason, January 20th, 1847, by
HENRY FAIRFAX and
O FAIRFAX,
Ex'ors of T. FA.

31 21 June, 1847.

Transferred to Mrs. Eliza Mason.
R. JOHNSTON, *Aud.*

Ap'l 8, 1850. Transf'd to Dr. O. Fairfax, ex'or of T. Fairfax.
R. JOHNSTON, *Aud.*

Nov. 23, 1858. Transferred to Dr. O. Fairfax.
SAM. J. McCORMICK, *Auditor.*

And now, at this day, to wit:

At a circuit court, continued and held for the city of Alexandria, at the court-house of said city, on Tuesday the 25th day of May, 1875.

This day came the *the* parties, by their attorneys, and the defendants pleaded covenants performed and covenants not broken, to which the plaintiff replied generally and the issues were joined; and the parties waiving a trial by jury of the issues joined, and submitting the cause to the determination of the court upon a statement of agreed facts filed and made part of the record in the cause, and the matters of law arising thereon being argued, it seems to the court, upon the whole matter therein contained, that the law is for the defendants; therefore it is considered by the court that the plaintiff take nothing by his bill, and that the defendant go thereof without day, and recover of the plaintiff their costs by them about their defence in this behalf expended.

A true copy from the record.

Teste:

MORTON MARYE, *Clk.*

A copy—teste:

GEO. L. CHRISTIAN, *C. C.*

32 And upon another day, to wit, Wednesday, April 5, 1876, came again the parties, by their counsel, and thereupon the defendant moved the court to advance the cause on the docket, whereupon it was ordered that such motion be docketed and continued until the 12th instant following.

And at another day, to wit, Wednesday, April 12th, 1876, came again the parties, by their counsel, and on the motion of the plaintiff, and for reasons appearing to the court, it was ordered that this cause be set down to be heard as a privileged cause.

And at another day, to wit, Thursday, November 16th, 1876, this cause was this day partly heard upon the transcript of the record of the judgment aforesaid and the arguments of counsel, and continued until the morrow.

And at another day, to wit, Friday, November 17, 1876, this cause was this day further heard upon the transcript of the record of the judgment aforesaid and the arguments of counsel, and continued until the morrow.

And at another day, to wit, Saturday, November 18th, 1876, this cause was this day fully heard upon the transcript of the
33 record of the judgment aforesaid and the arguments of counsel, but because the court here is not yet advised of its judgment to be given in the premises, time is taken to consider thereof.

And now at this day, to wit, Thursday, January 11, 1877, (being the day and year first herein written,) came again the parties, by their counsel, and the court having maturely considered the transcript of the record of the judgment aforesaid and the arguments of

counsel, it seems to the court here, for reasons stated in writing and filed with the record, that the circuit court erred in rendering judgment for the defendant instead of for the plaintiff upon the case agreed: Therefore it is considered that the said judgment be reversed and annulled, and that the plaintiff recover against the defendant his costs by him expended in the prosecution of his writ of supersedeas aforesaid here; and this court proceeding to give such judgment as the said circuit court ought to have given, it seems to the court that the law is for the plaintiff upon the said case agreed: Therefore it is further considered by the court here that the plaintiff recover against the defendant eight thousand seven hundred dollars, with interest at the rate of six per centum per an-
34 num on three thousand five hundred dollars, part thereof, from the 13th day of February, 1867, until payment, and on five thousand two hundred dollars, the residue thereof, from the 1st day of July, 1867, until payment, and his costs by him about his suit in the said circuit court expended.

Which is ordered to be certified to the said circuit court of the city of Alexandria.

The reasons stated in writing and filed with the record, referred to in the foregoing judgment, is in these words and figures following, viz:

35 If the district court had no jurisdiction to render the decree of confiscation relied on as a defence by the defendant in this case, then it is admitted by the counsel on both sides, and is clearly shown by authority, that the said decree is void, and must be so regarded, even in a collateral proceeding such as this is.

It is also admitted by the counsel on both sides, as is clearly shown by authority, that as the proceeding in this case is *in rem*, to give the court jurisdiction of the case the *res* must have been brought by *seizure* within the power and control of the court. Was it so brought?

"By the seizure of a thing," said the Supreme Court, in Pelham v. Rose, 9 Wallace, 106, "is meant the taking of a thing into possession, the manner of which, and whether actual or constructive, depending upon the nature of the thing seized; as applied to subjects capable of manual delivery, the term means caption, the physical taking into custody."

"In the case at bar," further said the court, "a vestable thing, capable of physical possession, is the subject of the libel. It is the promissory note of Pelham which constitutes the *res* against which the proceeding is instituted, and not a credit or debt which the note is supposed by the defendant's counsel to represent. Whether
36 by any proceedings under the act of July, 1862, the indebtedness of a maker on a negotiable promissory note, before its maturity, could be reached, without the possession of the note itself, is not a question presented for our consideration. It is sufficient that the object of the present libel is to reach the note itself.

This appears at an early stage of the proceedings," &c. "To effect its seizure, as required by the act, it was, therefore, necessary for the marshal to take the note into his actual custody and control."—(See, also, Pelham v. Way, 15 Id., 196.)

That a credit was liable to "seizure," within the meaning of the act of July 17th, 1862, clearly appears, not only from the express language of the act itself, but also from the various adjudications upon it by the Supreme Court of the United States.

First, as to the express language of the act: The fifth section enacts "that to insure the speedy termination of the present rebellion, it shall be the duty of the President of the United States to cause the seizure of all the estate and property, money, stocks, *credits*, and effects of the persons hereinafter named," &c. And the 6th section makes it the duty of the President "to seize and use as aforesaid, all the estate, property, moneys, stocks, and credits of persons within any state or territory." &c.

37 Secondly, as to the decisions of the Supreme Court upon the subject: They are Miller v. United States, 11 Wall., 268; Brown v. Kennedy, 15 Id., 591.

But as a credit is incapable of being *actually* seized, it must be *constructively* seized, if seized at all.

How may it be constructively seized?

The act of Congress does not prescribe the mode, as it might have done; and if it had done so, no doubt a seizure in that mode would have been sufficient, and perhaps the only seizure that would have been sufficient.

But the act of Congress, as we have seen, makes it the duty of the President of the United States to seize, or cause the seizure of, all the estate, property, moneys, stocks, credits, &c., as aforesaid; thus, it seems, making it his especial duty to prescribe rules in regard to seizure where doubt or difficulty might arise on the subject. Accordingly, it is stated in 11 Wall., pp. 273 and 274, that in order to carry out these acts of August 6th, 1861, and July 17th, 1862, the President charged the Attorney-General with the superintendence and direction of all proceedings under them, and authorized and required him to give to the district attorneys and marshals such instructions and directions as he might find needful and convenient, touching all seizures, proceedings, and con-

38 demnations under them. Accordingly, on the 8th of January, 1863, the Attorney-General issued general instructions on the subject to district attorneys and marshals. Among these instructions, the following were given with regard to the seizure of property:

"All seizures will be made by the marshal of the proper district, under written authority to be given him by the district attorney, specifying with reasonable certainty the property to be seized and the owner whose right is sought to be confiscated.

"When the marshall has seized any property under such authority, he will, without unnecessary delay, make a true return thereof in writing to the district attorney.

"Where the state law directs the method of seizure, it shall be conformed to as nearly as may be consistently with the acts of Congress. If the thing to be seized be *personal* property, it ought to be *actually seized and safely kept;* if real estate, the marshal ought to seize all the right, title, interest, and estate of the accused party, giving notice in writing of the seizure to the tenants in possession, if any; if stocks, or other intangible property, the marshal ought (if there be no specific method prescribed by the state law) to describe the property as plainly as he can in his return, and
39 leave the court to determine the sufficiency of the seizure."

The subject of the proceeding in this case, viewing it most favorably for the defendant, was a "credit;" the method of seizure of such a subject, as directed by the state law, is that prescribed by the law in regard to attachments; and when the debtor is a corporation, as in this case, notice of the seizure ought to be given to the person on whom by law process against the corporation is required to be served.

By the state law, code of 1860, chapter 157, section 7, page 647, it is enacted, that an attachment "shall be sufficiently levied in every case by a service of a copy of such attachment on such persons as may be designated by the plaintiff in writing, or be known to the officer to be in possession of effects of or to be indebted to the defendant; and, as to real estate, by such estate being mentioned and described by endorsement on such attachment." See also sections 12 and 13 of the same chapter, id., page 648. In regard to the execution of process on a corporation, it is enacted in section 7 of chapter 170, page 707 of the same code, that "it shall he sufficient to serve any process against, or notice to, a corporation,
40 or it is mayor, rector, president, or other chief officer, or in his absence from the county or corporation in which he resides, or in which is the principal office of the corporation against or to which the process or notice is, if it be a city or town, on the president of the council, or board of trustees; or, in his absence, on the recorder, or any alderman or trustee." The method of seizure in this case ought, therefore, to have been that prescribed by the state law as aforesaid; that is, the marshal ought to have served a copy of the warrant of the district attorney, on the mayor of the city of Alexandria, or, in his absence, on the president of the council of said city, or, in his absence, on the recorder or any alderman of said city. The marshal knew, or might easily have known, this method of seizure prescribed by the state law, and ought to have been informed of it, if necessary, by the district attorney.

Instead of pursuing that course, the marshal pursued the course named in his return, which is in these words: "I certify that I have

seized the within-described property, and given notice to R. Johnson, esq., auditor of the corporation ef Alexandria, as within directed." In other words, instead of serving a copy of the warrant on the mayor, or, in his absence, on the next chief officer of
41 the city, who might have been present as aforesaid, he gave notice of it (whether orally or in writing is not stated) to "R. Johnson, esq., auditor of the corporation of Alexandria."

What are the duties of this auditor we know not. They may be important in regard to the debt of the corporation, and notice to him may, in fact, have been as apt to be communicated to the plaintiff as notice to the mayor. But it is enough to say that the law has made the mayor, &c., and not the auditor of the corporation, the agent thereof to receive such a notice, and service of notice upon him has no more effect in binding the corporation than service on any stranger would have.

In Miller vs. United States, 11 Wallace, 268, the seizure was of stocks in railroad companies in Michigan, was made by giving notice of seizure to the president of one and vice-president of the other of said companies, and was held to be a good seizure, having been recognized to be good by the court in which the proceeding was had, and the judgment of confiscation was pronounced. But the law of Michigan prescribed no mode of seizure of the stock of a corporation, and the court had prescribed none in that case. The court, therefore, held that the mode of seizure pursued in that case was reasonable and sufficient. But even in that case the seizure
42 was considered insufficient by three dissenting judges. The act of Congress in question is extremely penal in its effect, and ought, therefore, to be strictly construed, and a rigid compliance with all its requirements ought to be exacted. The means of defence which it afforded to those who were affected by it were exceedingly limited, and the mode of giving notice to them was necessarily very imperfect. It is all-important, therefore, that they should have the full benefit of any defect in the *ex-parte* proceedings had against them under that act. The objection goes to the want of jurisdiction in the court to pronounce the judgment complained of, and if the objection be a good one it makes the judgment null and void, even in a collateral proceeding. While presumptions are made in favor of the judgment of a court of competent jurisdiction, they are not made in favor of jurisdiction when that is the question in controversy, and especially is that the case when the court whose jurisdiction is in controversy is one of limited jurisdiction, such as are the district and circuit courts of the United States. It cannot be presumed, therefore, in favor of the jurisdiction of the court in this case that the marshal seized the property described in the warrant in the mode required by law, and especially can it not
43 be so presumed in the face of his return, which shows that the only mode of seizure was by giving notice to R. Johnson,

auditor of the corporation of Alexandria, which, as we have seen, was not a legal mode of seizure.

Then the *res* in this case was not brought by seizure within the power and control of the court which rendered the decree of confiscation in this case, which decree is, therefore, null and void, and the judgment of the court below must, on that ground, be reversed and annulled. But the decree of the district court is void for another reason, and that is, the plaintiff in error was deprived, by a rule of the said court, of his legal and constitutional right to appear and defend himself in said court against the charge on which the proceeding to confiscate the property, as aforesaid, was founded. According to the agreed statement of facts in the case, "between March 14th and April 11th, 1864, an attorney-at-law appeared before John C. Underwood, Judge of the District Court of the United States for the District of Virginia, at Alexandria, and endeavored to procure from him a reversal of the decree of confiscation entered in favor of the United States against Dr. Orlando Fairfax's (the plaintiff in this cause) house and lot, situated on Cameron street in the city of Alexandria. The judge, the Hon. Jno.
44 C. Underwood, informed the attorney, from the bench, that he could allow no appearance for any 'rebel or traitor,' that this was the rule of his court, as before that publicly announced, and that he had in every case ordered the appearance of counsel for, and the answer of, rebels to be stricken from the files. The records of three confiscation cases, tried in the United States District Court for the District of Virginia, before the said Jno. C. Underwood as judge, between March 10th, 1864, and May 4th, 1864, in which the United States was plaintiff and Dr. Orlando Fairfax (the plaintiff in this cause) was defendant, show that in each case the above rule and practice of the court are proven by said attorney, that is, to allow no appearance for any rebel or traitor, was carried out against Dr. Orlando Fairfax, the defendant in those causes and the plaintiff here, and that the appearance of his attorney and his answer in those three causes tried and determined between March 10th, 1864, and May 4th, 1864, was, by order of said United States district court at Alexandria, stricken from the files, on the ground that said Dr. Orlando Fairfax was within the Confederate lines and a rebel."

The judgment for the confiscation of the stock and bonds held by Dr. Orlando Fairfax and the money due to him thereon by the city of Alexandria was rendered by the said district court
45 on the 4th day of May, 1864, after the trial of the other three confiscation cases against the same defendant, referred to in the said agreed statement of facts, in which cases his other estate, or some of it, was confiscated, and was in form a judgment by default, in the following words: "The papers in this cause having been heretofore returned, the usual proclamation having been made, the default of all persons having been duly entered, and due

deliberation being had of the pleadings: It is, therefore, on motion of L. H. Chandler, attorney for the United States, adjudged, ordered, sentenced, and decreed by the court that the personal property, mentioned and described in the libel in this case, be and the same accordingly is confiscated and condemned as forfeited to the United States," and then follows an award of a writ of *venditioni exponas* for a sale of the said property.

Whether the defendant, Fairfax, offered to appear and make his defence in said case and was refused permission to do so, or refrained from doing so vain a thing by the rule of the court which had just been enforced against him in three other confiscation cases, does not appear. No doubt he would have so appeared and made his defence in the said case but for the said rule. If he had so appeared and made his defence, and afterwards, before the
46 hearing of the case, the appearance and defence had been stricken from the files, on the ground that he was a "rebel" or a "traitor," there can be no doubt but that the judgment afterwards rendered in the case, as by default, would have been reversed by the Supreme Court of the United States. It was so expressly and unanimously decided by that court in McVeigh vs. United States, 11 Wallace, 259, in which Mr. Justice Swayne, delivering the opinion of the court, said: "In our judgment the district court committed a serious error in ordering the claim and answer of the defendant to be stricken from the files. As we are unanimous in this conclusion, our opinion will be confined to that subject. The order, in effect, denied the respondent a hearing. It is alleged that he was in the position of an alien enemy, and hence could have no *locus standi* in that forum. If assailed there he could defend there. The liability and the right are inseparable. A different result would be a blot upon our jurisprudence and civilization. We cannot hesitate or doubt on the subject; it would be contrary to the first principles of the social compact and of the right administration of justice." Accordingly the judgment of the district court in that case was reversed, and the cause remanded to the circuit court, with instructions to proceed in it in conformity to law.

47 In Underwood vs. McVeigh, 23 Grat., 409, it was unanimously held by this court that, even in a collateral proceeding between other parties, the judgment of the district court referred to in McVeigh vs. United States, *supra*, having been rendered in the absence of McVeigh, was a nullity, and the deed of the marshal passed no title to the purchaser. Judge Christian, in delivering the opinion of the court, said: "The sentence of condemnation and sale was a nullity—void *in toto*. It was rendered absolutely void by the act of the court in refusing to permit McVeigh to appear and be heard. The authorities on this point are overwhelming, and the decisions of all the tribunals of every country, where an enlightened jurisprudence prevails, are all in one way. It lies at the very foundation of justice that every person who is to be affected

by an adjudication should have an opportunity of being heard in defence, both in repelling the allegations of fact and upon the matter of law, and no sentence of any court is entitled to the least respect in any other court, or elsewhere, when it has been pronounced *ex-parte*, and without opportunity of defence." "A tribunal which decides without hearing the defendant or giving him an opportunity to be heard cannot claim for its decrees the weight of a judicial
48 sentence.—(See Smith's Leading Cases, vol. 1, part 2, ed. 1872, pages 1118–19 and 20, and the numerous cases there cited.)"

Such is the settled law where the defendant's appearance and answer are stricken from the files and the court then goes on to decide the case in the absence of the defendant and without being willing to hear him. In that case the judgment is not only void but may be reversed on error by an appellate court.

But what difference can it make that the defendant's appearance and answer were first received and stricken from the files if he was not permitted to appear? It may make this difference, to be sure, that in the latter case the refusal of the court to permit him to appear not being matter of record in the case he can obtain no relief by writ of error to an appellate court. But that difference strengthens the reason for giving him relief in a collateral proceeding, which is his only remedy. Surely he is entitled to some remedy for the grievous wrong which is done him by not permitting him to appear and defend himself against a criminal charge which is made against him. It is not his fault that he has no remedy by writ of error. He had no power to appear against the rule of the court to the contrary. He could not, therefore, make the refusal
49 of the court a matter of record in the case. The judgment is, therefore, absolutely null and void and must be so regarded in a collateral proceeding. The defendant is in effect not a party to the proceeding and a judgment cannot be conclusive against a person not a party.

The defendant's right to appear and defend himself against the criminal charge made against him in the libel is manifest from the nature of the act of Congress and all the proceedings against him in the confiscation case. The act was not made for the confiscation of property merely because it was enemy's property, but because the owner of it had been guilty of certain criminal acts defined in the law. His guilt of those criminal acts is the foundation of the judgment of confiscation against him, and his right to defend himself against the charge of these acts is just as clear as would be his right to defend himself against a charge of murder or any other crime. Almost every step in the proceedings recognizes the right of the defendant to appear and make his defence. In the conclusion of the libel prayer is made that process of monition may issue against the owner of the property therein described, and against all persons interested, or claiming an interest therein, warning them,

at some early day, to be therein named, to appear and ans-
50 wer this libel of information, and the owner of said property being absent and non-resident, prayer is further made for order of publication in the usual form, &c. And to the same effect are the subsequent proceedings in the case, as, for instance, the order of the court awarding the monition; appointing a time and place for the trial of the cause, and directing notice of such time and place, and of the substance of the libel, to be given by publication thereof in a newspaper published in the city of Alexandria, and also by posting up the same at the court-house door, and that proclamation of the pendency of the suit be made by the marshal at the court-house door, twice weekly, until the day of trial. All of these directions appear by the record to have been complied with.

What a mockery, in the face of all these proceedings, disregard to notify the defendant of the charges made against him, and to afford him an opportunity of appearing and making his defence, was the application to his case of the rule of court to "allow no appearance for any 'rebel' or 'traitor,'" thus assuming his guilt of the crime charged against him, which charge he was summoned to answer.

That he was prevented by this rule, thus announced, from appearing and making his defence is manifest. He had ap-
51 peared and made his defence in several other confiscation cases against him, tried just before the trial of this one, and his appearance and defence in those cases had been stricken from the file under the operation of the rule which was then announced to his attorney. He had precisely the same reason for appearing and making his defence in this case as in those cases, and he would, no doubt, certainly have done so but for the rule which barred the court against him. It was certainly not necessary for him to do so vain a thing, to knock at the door of the court after it was barred, and when he knew it would not be opened to him. It can hardly be necessary to cite authority in support of views which seem to be self evident. The cases of Dean vs. Nelson, 10 Wall., 158; Lasere vs. Rochereau, 17 Id., 437, and Tacey vs. Irwin, 18 Id., 549, strongly sustain them; but it is unnecessary to do more than refer to them.

Upon the whole, the court is of opinion that the judgment of the circuit court is erroneous and ought to be reversed and annulled; that the law upon the facts stated in the case agreed is for the plaintiff, and that judgment ought to be rendered accordingly.

52 Since writing the foregoing opinion, we have received and read a copy of the opinion of the Supreme Court of the United States in the case of Windsor v. McVeigh, recently decided by that court, and not yet reported. We entirely concur in that opinion, and think the principles established by it fully sustain the views expressed by us in the latter branch of the foregoing opinion.

That decision entirely accords with the decision of this court in Underwood v. McVeigh, 23 Gratt., 409; the facts of the two cases being precisely alike. We have endeavored to show in the foregoing opinion that there is, at least, as much reason in this case as there was in that for considering the judgment of confiscation void on the ground that it was "a sentence of a court pronounced against a party without hearing him or giving him an opportunity to be heard." Such a sentence was not a judicial determination of his rights, and is not entitled to respect in any other tribunal," according to the opinion of the Supreme Court in the case above cited.

We deem it unnecessary to say anything further than to express our gratification that a principle which seems to us to be so
53 just has thus received the emphatic sanction of that high tribunal.

STATE OF VIRGINIA, CITY OF RICHMOND. } *to wit:*

I, George L. Christian, clerk of the Supreme Court of Appeals of Virginia, at Richmond, do hereby certify that the foregoing is a true transcript of the record of the case of Fairfax against The City Council of Alexandria, lately pending and decided in said court. In testimony whereof, I have hereunto set my hand and affixed the seal of the said court, at Richmond, this 23rd day of February, 1877.

[SEAL.] GEO. L. CHRISTIAN.

54 UNITED STATES OF AMERICA, *ss:*

[SEAL.] The President of the United States to the honorable the judges of the Supreme Court of Appeals of the State of Virginia, greeting:

Because, in the record and preceedings, as also in the rendition of the judgment of a plea which is in the said supreme court of appeals, before you, or some of you, being the highest court of law or equity of the said state in which a decision could be had in the said suit between Orlando Fairfax, appellant, and The City Council of Alexandria, appellee, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said state, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the
55 decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty, or statute of, or commission held under, the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath

happened, to the great damage of the said appellee, as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, on the second Monday of October next, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and custom of the United States, should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the said Supreme Court, the fifteenth day of February, in the year of our Lord one thousand eight hundred and seventy-seven.

D. W. MIDDLETON,
Clerk of the Supreme Court of the United States.

Allowed by M. R. WAITE,
Chief Justice Sup. Ct. U. S.

A true copy of the foregoing writ of errors was this day filed in the clk's office of the Supreme Court of Appeals of Virginia.

Teste: GEO. L. CHRISTIAN, *C. C.*
Feby. 20th, 1877.

56 Know all men by these presents, that we, the City Council of Alexandria, Virginia, Joseph Broders, Lewis McKenzie, J. B. Johnson, M. B. Harlan, W. H. Marbury, William Cogan, J. C. O'Neal, Henry Strauss, John T. Armstrong, C. C. Smoot, Hugh Latham, and Michael Smith, E. E. Downham, all of the city of Alexandria, Virginia, are held and firmly bound unto Orlando Fairfax, in the just and full sum of twelve thousand dollars, to be paid to the said Fairfax, his personal representatives or assigns; to the payment whereof well and truly to be made we bind ourselves jointly and severally, firmly by these presents, sealed with our seals, and dated this 13th day of February, 1877.

The condition of the above obligation is such that whereas lately, at a Supreme Court of Appeals for the State of Virginia, in a suit therein depending between said Fairfax, plaintiff, and said City Council of Alexandria, defendant, judgment was rendered against the said City Council of Alexandria, and it has obtained a writ of error, and filed a copy thereof in the clerk's office of the said county, to reverse the judgment in the aforesaid suit, and a citation directed to the said Fairfax, citing and admonishing to appear, at a Su-
57 preme Court of the United States, to be holden at Washington, on the second Monday of October next: Now, if the

said City Council of Alexandria shall prosecute said writ of error to effect, and answer all damages and costs, if it fails to make its plea good, then the above obligation to be void, else to remain in full force and virtue.

	E. E. DOWNHAM.	[SEAL.]
	JOS. BRODERS.	[SEAL.]
	LEWIS McKENZIE.	[SEAL.]
	M. B. HARLAN.	[SEAL.]
	J. B. JOHNSON.	[SEAL.]
	W. H. MARBURY.	[SEAL.]
Alexandria Corporation Seal.	WM. COGAN.	[SEAL.]
	J. C. O'NEAL.	[SEAL.]
	HENRY STRAUSS.	[SEAL.]
	JOHN T. ARMSTRONG.	[SEAL.]
	C. C. SMOOT.	[SEAL.]
	HUGH LATHAM.	[SEAL.]
	MICHAEL SMITH.	[SEAL.]

Acknowledged before me the day and year first above written.

JOHN S. FOWLER,
U. S. Commissioner.

Approved February 15, 1877.

M. R. WAITE,
Chief Justice Sup. Ct. U. S.

58 UNITED STATES OF AMERICA, EASTERN DISTRICT OF VIRGINIA, } *ss.*

Before me, John S. Fowler, a U. S. commissioner in and for the eastern district of Virginia, personally appeared E. E. Downham, Jos. Broders, Lewis McKenzie, M. B. Harlan, J. B. Johnson, W. H. Marbury, Wm. Cogan, J. C. O'Neal, Henry Strauss, John T. Armstrong, C. C. Smoot, Hugh Latham, and Michael Smith, to me personally known, and parties to the above bond, and each made oath in due form of law that he is worth the sum of one thousand dollars, over and above his just debts.

Given under my hand and seal, at Alexandria, Va., this 14th day of February, A. D. 1877.

JOHN S. FOWLER,
[SEAL.] *U. S. Commissioner E. D. Va.*

The original bond, of which the foregoing is a true copy, was this day filed in the clerk's office of the Supreme Court of Appeals of Virginia.

Teste: GEO. L. CHRISTIAN, *C. C.*
February 20th, 1877.

59 The United States of America to Orlando Fairfax, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Wash-

ington, on the second Monday of October next, pursuant to a writ of error, filed in the clerk's office of the Supreme Court of Appeals of the State of Virginia, wherein the City Council of Alexandria is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this fifteenth day of February, in the year of our Lord one thousand eight hundred and seventy-seven.

M. R. WAITE,
Chief Justice Sup. Ct. U. S.

Feb'y 19, 1877. Service accepted.

C. W. WATTLES,
Counsel for O. Fairfax, defendant in error.

Filed in the clerk's office of the Supreme Court of Appeals of Va., Feb'y 20, 1877.

GEO. L. CHRISTIAN, *C.*

(Endorsement on cover:) Virginia, Sup. Ct. of Appeals. No. 705. The City Council of Alexandria, plaintiff in error, vs. Orlando Fairfax. Filed 2d June, 1877.

IN THE

Supreme Court of the United States.

TERM OF 1877—1878.

CITY COUNCIL OF ALEXANDRIA, Plaintiff in Error,
vs.
ORLANDO FAIRFAX, Defendant in Error. } No. 705.

IN ERROR TO THE SUPREME COURT OF APPEALS OF VIRGINIA.

Brief of Chas. E. Stuart, of Counsel for Plff. in Error.

ALEXANDRIA, VA.
G. H. Ramey & Son.
1877.

IN THE

Supreme Court of the United States.

TERM OF 1877—1878.

City Council of Alexandria, Plaintiff in Error,
vs.
Orlando Fairfax, Defendant in Error. } No. 705.

IN ERROR TO THE SUPREME COURT OF APPEALS OF VIRGINIA.

Brief of Chas. E. Stuart, of Counsel for Plff. in Error.

To the Hon. Justices of the Supreme Court of the United States.

In 1864, the plaintiff in this case, (the defendant in error here) was the owner of Alexandria Corporation stock to the amount of eighty-seven hundred dollars ($8700,) and held certificates thereof, copies of which are incorporated in the statement of agreed facts. The principal of this stock having, by the terms of the certificates, become redeemable, the present action was brought to recover the principal and arrearages of interest thereon.

The defence to the action is that this stock, and all accrued interest thereon was confiscated under the act of Congress of July 17, 1862, by the sentence of the District Court of the United States for the Eastern District of Virginia, entered on the 4th day of May, 1864.

If it was so confiscated, it will be agreed that the present action must fail.

The transcript of the record of the sentence of condemnation is also set out at length in the statement of facts agreed.

It appears from the Record that on the 22nd day of February, 1864, the District Attorney directed the Marshal to seize all the right title and interest of Dr. Orlando Fairfax, in and to the eighty-seven shares of stock of the Corporation of Alexandria.

On the 23rd of February, 1864, the Marshal returned upon this order, "I certify that I have seized the within described property, and given notice to R. Johnson, Esq., Auditor of the Corporation of Alexandria, as within directed," Record, p. 13.

Such further proceedings were had, that on the 4th day of May, 1864, by a decree entered in the cause, the property thus seized was confiscated and condemned as forfeited to the United States, and a sale thereof was ordered.

The eighty-seven shares of stock were sold, and transfered to the purchasers by the Marshal. The transfers thus made have been recognized as valid transfers by the plaintiff in error, and certificates to the same amount are now outstanding.

"The said eighty-seven shares of stock mentioned and described in said Record, are the shares or bonds evidenced by the certificates or bonds which are heretofore (in the Record) set forth, and which form the basis of the present action." Record, p. 19.

Does the Record show an effective confiscation of the stock?

This is the single question in the case:

As in Brown *vs.* Kennedy, 15 Wallace, 591, and Tyler *vs.* Defrees, 11 Wallace, 337, the Record is produced collaterally, by way of defence.

Coming before the Court collaterally, and not upon writ of error, for the reviewal of errors—if any there be—in the judgment of the Court that rendered the sentence of condemnation, the question: Does the Record show an effective transfer of the stock? resolves itself into and depends upon the answer to the inquiry:

Had the District Court jurisdiction to render the sentence of condemnation?

"According to the well settled doctrine in such cases, no error can be regarded here * * * * that does not go to the extent of showing a want of jurisdiction in the Court which rendered the judgment condemning the property."

Tyler *vs.* Defrees, 11 Wallace, 344.

By the act of July 17, 1862, the President was required to cause the seizure of all the estate, property, money, stocks, credits, and effects of the persons described in the act, and to secure their confiscation, it directed judicial proceedings *in rem* to be instituted in the District Courts of the United States.

The District Courts of the United States were thus invested with general jurisdiction over the subject of confiscation.

To give jurisdiction in any particular case, however, it was requisite that the subject of the confiscation should be seized, and brought under the power and control of the Court, whose sentence upon it was invoked.

With this seizure of the *res*, jurisdiction over the *res* commenced, and the jurisdiction having thus attached, every order and sentence made subsequently in the exercise of that jurisdiction, was and is valid against all collateral attack. However erroneous such order and sentence may have been, they have all the force of an order and sentence plainly right, unless and until reversed by regular proceedings in error.

It, therefore, becomes necessary to consider the question: Was there such a seizure of the stock in the present case, as to bring it under the power and control of the Court by which it was condemned?

If this question can be answered in the affirmative, jurisdiction of the *res* attached, the District Court had jurisdiction to render the sentence of condemnation, and the Record shows an effective confiscation of the stock.

A credit, denominated *stock*, was sought to be seized, it was described in the initiatory steps of the proceedings, and the Marshal was directed to *seize* it.

The officer's return to this order was direct and positive: "I certify that I have seized the within described property, and given notice to R. Johnson, Esq., Auditor of the Corporation of Alexandria, "as within directed."

Considering a similar question in a similar case, Brown *vs.* Kennedy, 15 Wallace, 597, the Court has said:

"Doubtless it is true that the Court had no authority to decree con-
"fiscation of any thing which had not, by the seizure of the Marshal,
"been brought within its jurisdiction. Seizure is essential to confer
"jurisdiction. But the Marshal's return—that he attached the bond,
"mortgage and credit, conclusively establish that a seizure was made,
"and the subjects of the seizure were within the jurisdiction of the
"Court. In this collateral proceeding the complainant is not at liberty
"to traverse the Marshal's return. An attempt was made to traverse
"it" [similar to that made in the present case] * * * "and from this
"we are expected to infer that the Marshal could not have seized
"them. We can, however make no such inference against the Mar-
"shal's return, without disregard of the established rule, that such a
"return is conclusive of the facts stated by it."

Again, where the question arose in a confiscation case before the same Court, on writ of error, Miller *vs.* United States, 11 Wallace, 294, the Court says:

"But how can it be maintained there was no sufficient seizure in "this case? The Record shows one. The Marshal returned to the "warrant that he had seized the property and that he then held it "subject to the further order of the Court. Why is not this conclusive? "Can a Sheriff's or Marshal's return to a writ be contradicted by a "plaintiff in error? It is true the return did not describe the mode of "seizure, but neither the writ nor the law required that more than the "fact should be stated."

The return in this case simply states the fact of seizure, but in addition to the statement, "I certify that I have seized the within described property," the Marshal adds "and given notice to R. Johnson, Esq., Auditor of the Corporation of Alexandria."

It is asserted by the defendant in error, that this latter portion of the return shows the manner in which the stock was seized, and, as under the law of Virginia, process cannot be served on the Auditor, the stock was not effectively seized.

This is an assertion not justified by the language of the return.

The return does not describe or show the manner in which the stock was seized. It simply asserts the fact that the stock has been "*seized*," "and neither the writ nor the law required more."

Miller *vs.* United States, 11 Wallace, 294.

The language of the return, "I certify that I have seized the within described property," *ex vi termini*, implies that every act necessary and proper to place the stock in the custody of the Marshal, and under the control and subject to the order and decrees of the Court, had been done. And then the Marshal states, "and given notice to R. Johnson, Auditor of the Corporation of Alexandria." The notice thus given to the Auditor, is stated as an independent fact, and not as the mode in which the seizure was made. Whether the notice was served upon the Auditor out of abundant caution, or for what reason, is not known, but it was a notice given to the officer, who under the terms of the act creating it, had control of the transfer of the stock.

"How, then, can it be maintained, there was no sufficient seizure in the case," when, in a collateral inquiry, the Record contains the emphatic assertion that the property has been seized?"

But it has been held by the Supreme Court of Appeals of Virginia, this seizure was made by serving a notice upon the Auditor, an officer upon whom under the law of the State of Virginia, process could not be served.

This ruling does violence to the language of the return, which does not justify such a construction.

As argued above, the return states primarily a seizure of the *res*, and, as a matter of secondary importance, the notice to the Auditor.

But upon the assumption of the Court that the seizure was made by serving a notice upon the Auditor, and that this could not be done under the *State law*, it may be argued:

That the proceedings were in conformity with the laws of the State of Virginia in every particular, except this purely technical one:

That however the process was served, there was an actual seizure of the *res*, of which the City Council of Alexandria had notice, and under which notice it acted. The Record shows a seizure, which as a matter of fact, and as proved by the result, brought the stock completely under the control of the Court. The seizure being of a credit, there could be no manucaption of the stock, the notice therefore was given to the officer, who was alone authorized to transfer the stock.

In the nature of the case, it was the only effective method of seizure; it stayed and prevented any change of property in the stock, pending inquiry by the Court—the hand of the Court was literally upon it, and its control was recognized by the Corporation of Alexandria, in its subsequent recognition of the Marshal's transfer to the purchasers, under the sentence of condemnation.

The Libel asserted "that the said property herein described (to wit, the stock) *has been seized* by the United States Marshal.

The Court, with the statement of the libel, and the return of the Marshal before it, adopted and ratified the Marshal's action, as a valid seizure. No rule, either of law or practice, prescribed any specific method of seizure in the case of property not susceptible of actual manucaption; and by the express terms of the confiscation act, the Court was empowered to adopt such practice, as it might deem necessary, effectively to carry out the purposes of the act.

It was competent, therefore. either to give specific directions to the Marshal, in advance, or to adopt and recognize his action afterwards; and when the Marshal's action was such as to arrest the property, and the Court ratified such action, as a valid seizure, the sufficiency of the seizure is left no longer an open question.

Miller *vs.* United States, 11 Wallace, 298.

The stock then, having been duly seized, the District Court had jurisdiction to condemn it as forfeited to the United States, and the Record shows an effective confiscation of the stock. Having acquired jurisdiction, and having entered judgment of condemnation, that judgment and the rights acquired under it are unassailable in this case. The sentence of condemnation divested the plaintiff of the stock, the Marshal's sale transferred the title to the purchaser and the Corporation of Alexandria could not legally withhold the certificates of their ownership.

On the effect of a decree rendered by a Court having jurisdiction, see

Grignon's Lessee *vs.* Astor, 2 How., 319.
Voorhees *vs.* Bank United States, 10 Peters, 449.
Cooper *vs.* Reynolds, 10 Wallace, 308.

And specially.

Kempe's Lessee *vs.* Kennedy, 5 Cranch, 184.
Williams *vs.* Armroyd, 7 Cranch, 423.

The defense to this action is grounded upon the foregoing principles.

It remains now to consider the propositions upon which the Court of Appeals of Virginia based its judgment denying the validity of the confiscation Record, and the points made by the defendant in error.

But two propositions are discussed by the Court:

1st. That there was no seizure of the *res*, and therefore no jurisdiction in the District Court to enter the sentence of condemnation.

Nothing need be added to what has been already said upon this point except the observation, that the Court has proceeded throughout this portion of its opinion upon the theory that the Record shows the *manner* of seizure.

If the first branch of this argument construes the return aright, viz: that the Record does not show the manner of seizure, then this proposition is erroneous, and cannot be relied upon in support of the judgment of the Court.

2nd. The Court further held the decree of confiscation to be void and of no effect, because "the plaintiff in error (Fairfax) was deprived by a rule of the said Court of his legal and constitutional right to appear and defend himself in said Court, against the charge on which the proceedings to confiscate the property, as aforesaid, was founded."

Before discussing the legal effect of such a state of facts, it will be proper to ascertain what are the facts in *this* Record upon this point.

The only statements in the Record are among the Agreed Facts, where it is stated that between March 14th and April 11th, 1864, an attorney-at-law appeared before John C. Underwood, Judge of the District Court of the United States for the District of Virginia, at Alexandria, as counsel, and endeavored to procure of him a reversal of the decree of confiscation, entered in favor of the United States against Dr. O. Fairfax's house and lot. The Judge, the Hon. John C. Underwood, informed the attorney from the bench, that he could allow no appearance for any "rebel" or "traitor," that this was the rule of his Court as before that publicly announced, and that he had in every case ordered the appearance of counsel for, and the answer of "rebels" to be stricken from the files.

The Records of three confiscation cases tried in the same Court in which Fairfax was defendant, show that the above rule was carried out.

But the present Record "is not one of the confiscation causes heretofore referred to." Record, p. 10.

The Record now under discussion not only shows nothing of all this, but it is not even pretended that Fairfax entered or attempted to enter an appearance. On the contrary, the Record shows default of appearance, p. 17.

There is absolutely nothing in this Record upon which it can be said that the above rule was applied in this cause, or that, in any way, Fairfax was deterred from defending his rights in this cause, or that the city had knowledge of the rule.

The proposition therefore is based:

1st. Upon facts *dehors* the Record.

2nd. Upon an inference drawn from those facts sustained by no evidence and absolutely in contradiction of the positive averments of the Record.

The question therefore is directly presented, in a collateral inquiry, as against an innocent third party, in a cause where jurisdiction in the Court is shown, can evidence *dehors* the Record be introduced for the purpose, not only of annulling it, but of contradicting its express averments?

Where a Court has acquired jurisdiction of a cause, the Record of its judgment in that cause, cannot be impeached (even on error much less collaterally,) except for matters apparent on the face of the Record.

Bills of exception are all grounded on this principle, without it, no bill of exception would ever be necessary.

Jurisdiction of a cause being once acquired, no matter *in pais*, (fraud excepted) can be relied upon or offered to reverse, or in any way to affect the Record.

The judgment must stand or fall on the Record.

To hold otherwise would be to unsettle every interest and title founded on a judgment.

The City of Alexandria obeyed the mandate of the Court, upon a Record that disclosed none of the above facts. It acted *bona fide*, upon a Record to which, upon its face, no such objection can be made. It is therefore submitted that the question as to the validity of the Record, must be decided, in this inquiry, upon its averments.

The Court in its opinion assimilates this case to that of Windsor *vs.* McVeigh.

The cases differ materially. In Windsor *vs.* McVeigh, the Record disclosed the facts:

First, of the appearance. Default of appearance is shown by this Record.

Second. That this appearance was stricken from the files by order of the Court, and McVeigh denied a hearing.

Here there was no appearance nor attempt to make one.

In that case, therefore, all persons who dealt with the confiscated property had notice of the error from the Record, and dealt with it at their peril.

In other words, the Record itself gave notice to the world that it was a mere nullity.

This Record is free from such objection, upon its face.

How therefore, can it be said that Fairfax was denied a hearing when in this case, he never asked one?

Or how can it be said that he would have appeared, but for this rule when there is no evidence to show that he was deterred by it?

And if he knew of its existence and failed in any way to either notify the plaintiff in error, or to spread upon the Record the fact that he was denied a hearing, then he was guilty of *laches*, and cannot be heard to complain.

Upon this Record it may be truly said, if the doors of the Court were closed against him, it was because he never asked admittance.

The defendant in error however, relies upon Tacey *vs.* Irwin, 18 Wallace, 549, in support of this position. But the distinction between the cases is manifest. The validity of ministerial acts—the acts of ministerial officers—is always dependent upon matters *in pais*, the validity of judicial acts is determinable only by the Record of those acts.

The validity of a tax sale is wholly dependent upon the facts proved to be existing at the time of the sale, and these, of course are to be shown by evidence, the validity of a judgment of a Court having jurisdiction, is dependent wholly upon what appears in the Record of that judgment, exclusive of all outside facts whatever they may be.

Passing now to a consideration of the errors assigned by the defendant in error, in his petition to the Court below, (Record, p. 3, to 5,) a brief notice of some of the propositions therein relied on will now be taken.

The first and fourth are substantially the same, and relate to the mode in which after the sentence of condemnation and the sale, the stock was transferred.

The defendant in error cannot complain of this, if the proceedings were regular to the decree of condemnation. He had no interest in the stock after that, it became the property of the United States.

As in the Court below, it will be argued here that on the filing of the libel, no warrant of arrest was either prayed or issued. The argument implies, if it does not assert, that without this particular process, prayed, awarded and executed, there could be no seizure of the *res* which would give jurisdiction to the Court.

If this proposition be true, the argument is good.

In the case of Tyler *vs.* Defrees, before cited, *the point specially ruled* was, that the seizure made on the order of the District Attorney was all the seizure requisite to give full jurisdiction to the Court. No seizure under a warrant of arrest was necessary—none, indeed, as the Court says, would be possible; for how could the Marshal seize a second time what was already in his possession under a former seizure.

In ordinary revenue cases a warrant of arrest is the usual process prayed, and awarded on the libel, and its issue and service are necessary to give the Marshal possession of the *res*, because, in these cases, the original seizure is made by some officer of the revenue, or some officer other than the Marshal, and the warrant of arrest is the proper process for transferring the possession from one to the other.

In confiscation proceedings the original seizure is made by the Marshal, and there is consequently no office for the warrant of arrest to perform.

As, then, the warrant of arrest would have been useless, the omission to pray for it was regular, the irregularity would have been in asking it; notice to the claimant of the property was the only process proper to be asked or to be awarded.

In the case referred to, (Tyler *vs.* Defrees,) a monition (citation and warrant of arrest) was issued as in ordinary revenue cases—it was not, however, either executed or returned; before the return day, even, the Court rendered sentence of condemnation, and the sentence was held unassailable collaterally, because the Court had acquired jurisdiction by the seizure of the Marshal under the order of the District Attorney.

And it is to be remarked that in the present case, as in the case of Tyler *vs* Defrees, the order of the District Attorney, and the Marshal's return thereon are incorporated into the facts agreed.

The next proposition, discussing the sufficiency of the seizure reported by the Marshal, on the order of the United States Attorney, is that the defendant in error was not the owner of eighty-seven shares of Alexandria Corporation stock, and that the Marshal, in seizing eighty-seven shares of such stock belonging to plaintiff, seized in fact nothing—there was no such thing to be seized. That there is and can be

no such thing as municipal stock, and especially that there is and could be no such thing as Alexandria Corporation stock, would seem a proposition difficult to be maintained, by one holding the certificates sued on in the present case.

"Alexandria Corporation stock" is the name stamped upon them, is the very thing of which the certificates purport to be the evidence; and not only is this the name which they bear on their front, but the body of them states that they evidence "stock created" in pursuance of an act of the Common Council of Alexandria.

That there is such a thing as "Alexandria Corporation stock," the plaintiff has himself furnished the plainest proof.

Even the declaration demands "stock," p. 6.

That this stock is unlike stock in a private corporation—that a municipal corporation is not a joint stock company—is readily conceded, but that no such thing as municipal stocks do or can exist, is a proposition of quite another complexion. State stocks and municipal stocks are as well-known to the commercial world as railroad stocks.

But if this were not so, the act which created the indebtedness evidenced by the certificates here filed denominates that indebtedness "*stock*," removing all questions as to the existence of such a thing and as to its nature. "Alexandria Corporation stock" describes a particular kind of indebtedness by the corporation of Alexandria, evidenced in a particular manner, transferred in a particular manner, bearing interest payable at specified times—all regulated by the law authorizing the indebtedness.

Reference to the acts under which the present stock was created (subjoined hereto) shows, that certificates of stock were to be issued in sums of not less than $100 each. Eighty-seven shares of stock was thus an equivalent expression for eighty-seven hundred dollars of stock, both signifying an indebtedness to the amount of eighty-seven hundred dollars.

When, therefore, the Marshal seized eighty-seven shares of Alexandria Corporation stock belonging to the plaintiff, he seized eighty-seven hundred dollars of indebtedness on the part of the corporation to the plaintiff—that much property of the plaintiff—a substance and not a shadow.

That this method of seizure (if that could now be inquired into) was effective, and so recognized by the Court, it is sufficient to refer to the earlier portion of this argument.

The distinction is to be observed between the "stock" and the "certificates of the stock," the one being the indebtedness and the other the mere evidence of the indebtedness. And it is further to be

observed that the order of seizure and the seizure itself were both directed to the "stock," and not to the "certificates of the stock."

The *certificates* being all the while within the Confederate lines, were beyond the reach of seizure, but the *indebtedness* was within reach of garnishment, and was actnally subjected to the process.

In seizing the indebtedness of the corporation to the plaintiff, there was a seizure of the plaintiff's "credits," "indebtedness of the corporation," and "credits of the plaintiff" being equivalent and convertible terms, and each in turn the equivalent of "corporation stock;" with reference to the corporation, "stock" is indebtedness; with reference to the "plaintiff, "stock" is a credit.

Pelham *vs.* Rose, 9 Wallace, 103.
Pelham *vs.* Way, 15 Wallace, 200.

The Court of Appeals of Virginia, in rendering the judgment complained of, gave its reasons which are filed in the Record.

The key to its decision will be found in the following language:— "The act of Congress in question is extremely penal in its effect, and ought therefore to be strictly construed, and a rigid compliance with all its requirements ought to be exacted, p. 27.

This Court has said: "Where the constitutionality of the confiscation act being established, we are called upon to sit in review on the judicial proceedings of the inferior Courts in the enforcement of these statutes, we are to be governed by the reasonable and sound rules applicable to analogous cases in the Courts, and not by a system of procedure, so captious, so narrow, so difficult to understand or to execute, as to amount to a nullification of the statute."

Tyler *vs.* Defrees, 11 Wallace, 345.

The evident conflict between the sentiment of the two Courts in cases like this is plainly shown from these extracts.

It remains now to sum up the foregoing propositions.

This action must fail if there was a valid confiscation of the stock.

There was an effective confiscation of the stock, if the Court had jurisdiction to enter the sentence of condemnation.

The Court had jurisdiction to enter the sentence, if the stock was properly seized.

The stock was properly seized, because the Marshal's return is conclusive of the fact of seizure, it not being traversable; and even if traversable, the method of seizure shows one that was unobjectionable.

The defendant in error has thus been divested of his property in the stock by the decree of a Court of competent jurisdiction, which has never been reversed.

It is therefore respectfully submitted that the judgment of the Supreme Court of Appeals of Virginia in this cause should be reversed, and the judgment of the Circuit Court of the City of Alexandria be affirmed.

Y. Ferguson Beach

CHARLES E. STUART,

Counsel for Plaintiff in Error.

Alexandria, December, 1877.

APPENDIX.

AN ACT to authorize a further subscription on behalf of the Common Council of Alexandria to the stock of the Alexandria Canal Company.

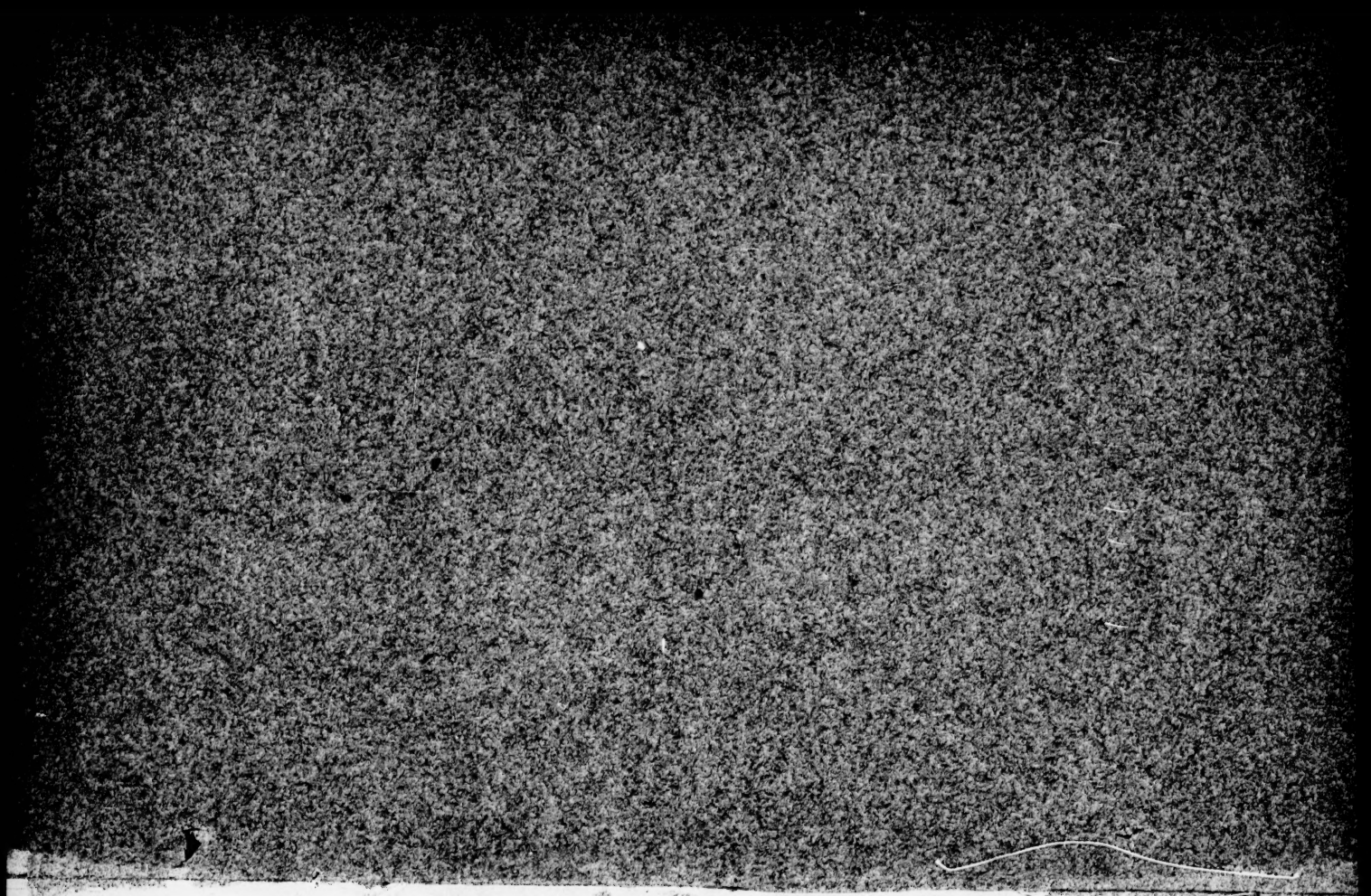
1. *Be it enacted by the Common Council of Alexandria*, That the President of the Common Council be, and he is hereby, authorized and directed to subscribe, &c., &c.

2. That to raise the funds necessary for the payment of the said subscription, the Mayor and President of the Common Council be, and they are hereby authorized * * to borrow * * two hundred and fifty thousand dollars * * payable half yearly and redeemable * * twenty-five years from the time of effecting said loan, and to issue certificates of stock accordingly, in sums of not less than one hundred dollars each, to be signed by them, respectively in their official capacities, and to be countersigned by the Auditor.

AN ACT to provide for the exchange of certain stocks therein mentioned.

1. *Be it enacted by the Common Council of Alexandria*, That the proprietors of stock issued under the act of the Common Council passed the 2d day of May, 1835, be, and they are hereby, authorized to exchange the same for an equal amount of stock of this Corporation, to bear interest at the rate of six per cent. per annum, payable on the first day of January and July in each year, and redeemable at the pleasure of the Common Council, on or before the first day of January, 1870.

2. *And be it further enacted*, That the proprietors of the stock issued under the act aforesaid, surrendering the certificates thereof, the Mayor, President, * * and Auditor be, and they are hereby, authorized and required to issue and deliver to them, respectively, [certificates] for equal amounts of stock, as hereinbefore mentioned, which certificates to be issued shall be signed by the Mayor, * * * and shall be transferable at the office of the Auditor on a book to be by him kept for the purpose.



IN THE

Supreme Court of United States.

City of Alexandria,	*Plaintiff in Error.*	705
vs.		
Orlando Fairfax,	*Defendant in Error.*	

ARGUMENT FOR DEFENDANT IN ERROR.

IN THE

Supreme Court of United States.

CITY of ALEXANDRIA, *Plaintiff in Error,*
vs.
ORLANDO FAIRFAX, *Defendant in Error.*
} 705

ARGUMENT FOR DEFENDANT IN ERROR.

In February 1864 Dr. O. Fairfax was living at the confederate capital, Richmond, and had been living there continously since the beginning of the war. He had with him during all this period, within the confederate lines, four bonds of the city of Alexandria: one for $2,000, one for $1,000, one for $500, and the last for $5,700; all bearing interest at the rate of six per cent. per annum, the three first being payable in July 1861, the last one on the 1st day of January 1870.

These bonds were the promise of the corporation of Alexandria and the common council of Alexandria to pay those several amounts, and were under seal; and they were never out of Dr. Fairfax's possession from the beginning to the close of the war, nor within the jurisdiction or control during that time of a federal court.

At the head of these bonds was printed "Alexandria Corporation Stock," and in the body of each bond it is spoken of as being "stock" "created" or "issued" in pursuance of an act of the city council of Alexandria of such a date. The principal of these bonds has never been paid Dr. Fairfax, nor the interest since July 1861.

In February 1864 a suit was instituted in the United States district court at Alexandria for the purpose of confiscating these bonds under the act of congress of July 17th, 1862, to punish treason, etc., and a libel was filed to confiscate "all the right, title and interest of Dr. O. Fairfax in and to eighty-seven *shares* of the *stock* of the corporation of Alexandria, together with all the monies due from the said corporation for *dividends upon the said stock*," &c. Such is the libel's statement—and it concluded with the prayer (as provided by *rule* 22, *Supreme Court Rules*) that "*process* of monition may issue against the owner and owners of the property herein described, and against all persons interested or claiming an interest therein, warning them at some early day, to be therein named, to appear and answer this libel of information; and the owner of said property being absent and non-resident prayer is further made for order of publication in the usual form," &c.

This libel was the commencement of the judicial proceeding (see Benedict's Admiralty, 2nd edi. pp. 372–413); Adm. Rules Sup. Ct. 1; Conkling's Tr., 5th edi., 541. Here the record of the cause begins,—here the suit.

It will be seen that the process asked is the "process of monition"—Conkling (5th edi. p. 533) says that this writ is usually and most properly denominated a warrant of arrest, but it is also sometimes called a monition—and gives us in the appendix, p. 891, its form—which is that of an attachment and citation or monition combined—and which commands an *attachment* of the property libelled. Benedict's Ad. §§ 433, 434, 436, 438, 439, 440, 443.

Now this is on its face a suit *in rem*, and yet the only process prayed for is one against the person—against the owner or any other claimants of interest. In all suits "*in rem*, unless otherwise provided by statute, the process prayed for must be a warrant of arrest of the thing itself," &c. (Bendict's Ad., sec. 425, § 410, and Rules Sup. Ct. Ad., 2, 9, 37.) No process or attachment against the property libelled is asked for, and on examination of the record it will be found that no such judicial writ or warrant of arrest or attachment was ever issued in the cause against this property or any property of Dr.

Fairfax—and no authority given the marshal to attach the "debts," "credits,", or "right, title and interest" of Dr. Fairfax in any property.

The libel states Dr. Fairfax was absent and non-resident, and yet asks for no attachment *in rem.* How then, without a levy, could the court acquire jurisdiction over the thing or "debt" or "credit?" And yet no levy or attachment was prayed for or issued.

The only mesne process is a notice or monition to the owner, &c., that *L. H. Chandler*, attorney for the United States, had caused "all the right, title," &c., to be seized, as forfeited, by the United States marshal. Not that the court had seized—not directing and commanding the marshal in the name of the court or of the United States to seize, attach, etc., "all the right, title and interest," &c., of the absent owner. That the libel only prayed for a citation without arrest is apparent from the fact that it was not *sworn* to.—Where an arrest or attachment is asked it must in all cases be sworn to (Benedict, § 413).

There is no order in this process for the marshal to hold the property subject to the order of the court, no command for its detention.

There was then no warrant of arrest, no attachment, no valid subsisting seizure to give the court jurisdiction, no return to any such writ, no return day in fact. The record shows nothing of the sort. Conkling, 5th ed., 577th page; Bett's Ad. Pr., p. 32; The Washington, 4th Blatchford 101; *U. S* v. *Leroy Wiley's stock*, 5 do. 231; The Silver Spring, 1st Sprague 551.

In Miller's case, p. 294, 11th Wallace, the court says, *if* there was *no such seizure* of the stocks as gave the court jurisdiction to condemn them as forfeited, and to order their sale, it was a fatal error. "In revenue and admiralty cases a seizure is undoubtedly necessary to confer upon the court jurisdiction over the thing proceeded against when the proceeding is *in rem.*" * * * Here "the record (Miller's case) shows one. The marshal *returned* to the *warrant* that he had seized the property, and that he then held it *subject* to the order of the court.

Why is this not conclusive?" * * * * (Page 295.) (*The record*) shows that "the marshal had already seized the property, and it remained in his possession. An order to seize property already in his hands would have been superfluous. ALL *that was* NEEDED was, that having the property, he should *hold it subject to the order of the court. Thus held* by the officer *the jurisdiction* was *complete.*"

Thus it appears by the record in Miller's case, by the *officer's return* to the *warrant*, that it was so held, and the court say that shows the jurisdiction to have been complete.

Yet see same case further, on page 295: "Yet even in admiralty," &c., page 296. "But the marshal's return to the judicial warrant," &c.

It will then be seen that in *this* case the proceedings did not at all conform to those in admiralty and revenue. See opinion of the court (Miller's case, 295): "They must be adopted," &c. The proceedings were utterly unadapted to the peculiarity of the case, and there was no order or warrant of the court made on the information or libel.

It will be found that in all the cases reported in Wallace under this act, that the libel prayed process *in rem*, that in all the process *in rem* a warrant of arrest and attachment was issued, and that the *return* of the marshal to that warrant that he *had seized it*, or *held* it subject to the order of the court, was regarded as such a subsisting seizure as to render the jurisdiction of the court *complete.*

It was so in Miller's case, and counsel for the United States in argument, and court in decision, relied on that fact; 11 Wallace 292.

It was so in *Brown* v. *Kennedy*, 15th Wall. 598, 594, 597. There on the record was the marshal's return that he had attached the bond, mortgage and "credit." (Is there any such return to any such writ in the record in Dr. Fairfax's case?) In *Brown* v. *Kennedy*, the bond, mortgage and "credit" were informed against, and the marshal *commanded* to *attach* the bond, mortgage, etc., and "credit." The information *prayed process* against the *bond* and mortgage, and so *described* the bond.

The libel in Fairfax's case asks for no process either against the debt due from the corporation of Alexandria or against the evidence of that debt, and the record accordingly shows that none was issued.

It might have complied with the law. The debt to the doctor, due from the city of Alexandria, might have been legally and properly seized, attached and confiscated, which it was not, the proceedings might have been made to "*conform, as nearly as may be*, to proceedings in admiralty or revenue cases" (see 7th section of act), and they might have been adapted to the peculiarities of the case, following proceedings in admiralty and revenue *so nearly as may be* consistently with the objects congress had in view" (opinion of court, Miller's case 295), which they did not. On the contrary, the proceedings were totally unadapted to the peculiarities of the case, and in *no wise* followed the proceedings in admiralty and revenue cases in most important respects, to wit; no prayer for process *in rem*, and no process *in rem* on the filing of the libel. Had that been done, had the debt been attached in proper form according to the process usual in such cases, and known to the admiralty of foreign attachment, the jurisdiction of the court might have been made complete, and its decree unassailable in this court.

Dr. Fairfax's property in this matter was of two kinds: 1st, the visible evidences of the debt, the bonds themselves, which he had with him at Richmond; 2nd, the debt due him from the city of Alexandria. If the information was filed against the bonds, they could not possibly have been levied on as they were with him, in his possession, all the time, in the confederate lines. If against the debt, the libel should have prayed an attachment (as in admiralty and revenue cases) against the debt, and it should have been issued and served on the proper officer of the corporation. But there is no such proceeding.

On page 297, in Miller's case, 11 Wall., the supreme court say: "In all cases where the garnishee is a debtor, or where the garnishment is of stock, it is effected by serving notice upon the debtor or corporation. The *service* of an *attachment*, though it is but a notice, binds the debt or the stock in the

hands of the garnishee from the time of the service, and thenceforward it is potentially *in gremio legii.*"

Is it pretended there was any attachment or garnishment here in the record? The supreme court points out the way, and process served on the proper officer, the mayor or president of the council, &c., would have bound and arrested this debt of the corporation. But nothing of the sort was done.

In *Taylor* v. *Defrees*, 11 Wallace, the libel was a proceeding *in rem*, and a warrant of arrest was issued to the officer. Here it appears on the face to have been *in personam*, for only process is asked for against the owner, and in that case the district attorney's letter, and the marshal's return to it, were made part of the record.

But suppose for an instant that the letter of L. H. Chandler, United States district attorney, and the marshal's report to him before the commencement of the suit be a part of the record of the court, which we insist they were *not*. Let us examine if under them there was such a seizure as to give the court jurisdiction.

The instructions of the attorney general on this subject, January 8, 1863, are—

1st. The district attorney shall *specify*, "with *reasonable certainty*, the property to be seized," &c.

2nd. "If *stocks*, or other intangible property, the marshal ought (if there be no *specific method prescribed by the State law*) to *describe* the property as plainly as he can in his return, and leave the court to determine the sufficiency of the seizure."

Now, in Miller's case, those instructions were carried out, the district attorney in his letter *described* the stocks, and the marshal made his *return* that he had seized those stocks by serving a notice of said seizure on the president of one company, and the vice-president of another; all the stocks being railroad stocks; and in this return the marshal describes the property, naming it specifically that "he had seized the stock, bonds, coupons and dividends."

Now, Dr. Fairfax did not have eighty-seven shares of stock in the corporation of Alexandria; nor did he have any dividends due him on any such stock. He held the bonds of the

city of Alexandria, and there was interest due him. And upon enquiry at the proper office, both the district attorney and the marshal could have ascertained that this was not shares of stock in the corporation of Alexandria, but a debt due from the city of Alexandria to Dr. Fairfax, evidenced by a bond, and bearing interest payable semi-annually, but *no dividends*.

Not being stock, but a debt due Dr. Fairfax from Alexandria, he should have notified, by serving a notice on the mayor or president of the city council. They were, under the laws of the state, the proper officials to be notified. For there are laws of the state prescribing how such a debt may be seized—and it could be seized only by attachment and garnishment.

Thus it is seen that from the very letter of the attorney, and through the whole suit, that there has been a misdescription of the property,—a misnaming. No such description even in Chandler's letter and the marshal's return as is required by the attorney general's instruction (see Miller's case, p. 274).

The court say, in Miller's case, p. 297, a corporation holds its "*stock* as quasi-trustee for its stockholders," and they decide that in that case the marshal had levied upon and seized the *stock* in the hands of the railroad company, *the property* being in the hands of the parties who, through their *proper officer*, as *shown by the record*, had been served with sufficient notice. And in the case of the *State Tax on Foreign Bondholders*, 15 Wallace, p. 320, the court say: "*Debts* owing by corporations like debts owing by individuals are not property of the debtor in any sense: they are obligations of the debtor, *and only possess* value in the hands of the creditor. With them they are property and in their hands they may be taxed. To call debts property of the debtor is simply to misuse terms. All the property there can be in the nature of things in debts of corporations belongs to the creditors, and follows their domicile wherever that may be. The debts have no locality separate from the parties to whom they are due. * * * The bonds issued by the railroad company, in this case, are undoubtedly *property*, but *property in the hands of the holders*, not property in the hands of the obligor. So far as they are held by *non-residents*

of the state, they are property beyond the jurisdiction of the state."

3rdly. The door of this court was barred to Dr. Fairfax and his counsel; they could have no hearing there. Twice, previous, in July and December 1863, did Dr. F. by counsel in this court, as shown *by the records*, appear and endeavor to protect his rights and have a hearing—each time was a hearing denied him, and the appearance of his attorneys and the answers of Dr. F. stricken off. That this was the unvarying rule and practise in that court, so announced from the bench, cannot be denied.

In McVeigh's case, the supreme court characterize it as "a blot upon our jurisprudence and civilization," as "contrary to the first principles of the social compact and of the right administration of justice." In *Lasere* v. *Rochereau*, 17th Wallace 438, the court say, "it is contrary to the plainest principles of reason and justice that any one should be condemned as to person or property without an opportunity to be heard." Twice had Fairfax presented himself in court, twice had he been denied a hearing, and been repulsed, and the announcement made that it was the rule and practice of that court, and it was so publicly proclaimed from the bench, that no "rebel" should be heard there in defence of his rights. We contend therefore, and insist that under the recent decisions of the supreme court in the *Alexandria Tax Case*, it was needless, useless for Dr. Fairfax or his counsel to attempt to appear in that court to defend his rights, for under the previous decision in his case, in July and December 1863, he was not entitled to be heard, and the rule and practice proclaimed by the judge precluded them. The law does not require a man to do a futile thing, Broom's Legal Maxims. *Tacey* v. *Irwin*, 18 Wallace.

Under these circumstances, this decree of confiscation and sale was made. Can it stand, or must it be treated as a nullity, and the action of the United States marshal in transferring, or attempting to transfer this debt, as conveying and transferring *nothing*. That the whole proceedings in the federal court must be treated as null and void, and in no way affecting Dr. Fairfax's title to these bonds, and the interest on them, we referred

to, and rely on the authorities formerly cited, and to the case of *Underwood* v. *Mc Veigh*, in the court of appeals of Virginia.

The act of congress provides for the seizure of certain things, "estate, property, money, stocks, and *credits*" (section 6), and in section 7 it goes on to say "that to *secure* the condemnation and sale of any such property, after the same shall have been seized, proceedings *in rem* shall be instituted," &c.

Now can it be said that in this case there are any proceedings *in rem* when the libel or information asks for none, and no process is issued *in rem*.

In *Pelham's case*, and in all the confiscation cases, there was process of attachment issued, except in *Miller's case*, where the warrant of arrest ordered the marshal to "hold said stock, the same having been by you *duly seized*."

But in this case there is nowhere any order of the court to *attach or hold* the "credit." and it could only be seized by attachment.

In *Pelham* v. *Rose*, 9 Wall., the court say the act of July 17, 1862, contemplated the seizure of the property, the forfeiture of which is sought by the proceedings taken under its provisions. It says so in express terms.—p. 103.

The object of the libel in this case was the "credit," the debt due Dr. Fairfax, and it might have been attached or garnisheed, but no such process was asked or issued, though provided by the state law. As to the seizure relied on by counsel in the *Miller case* (see p. 228) they relied on the judicial writ—pp. 288, 289, 292. And the district attorney's letter and the marshal's report being part of the record by stipulation, the court say there was an attachment and seizure.

In *Brown* v. *Kennedy*, 15 Wall., p. 593, the court say if the proceedings, *including the service of the writ*, be *in proper form*, a forfeiture of a debt due to a rebel may be rightly decreed, though the evidence of debt have not been actually seized."

To bind Dr. F. there must have been some notice, actual or constructive. Now, in admiralty, the seizure of the thing and the monition is notice to all the world as well as the owner.

But Dr. F. had neither actual nor constructive notice. His bonds were not seized, nor the *debt* due him from the corporation. And so the sale was a *nullity*. See *Rohrer* on Judicial Sales, § 483, and authorities cited; *Shelton* v. *Tiffin*, 6 Howard 173.

In conclusion, to give a brief resume—

1. The marshal sets forth on the back of the letter of instruction, given him by the United States district attorney (pages 13 and 14 of record), *how* he *seized*, and on the face it appears there was no garnishment of the corporation, no seizure *in limine*. In Miller's case there was a garnishment of the corporation served on the proper officers, and the return shows it. In *Brown* v. *Kennedy*, 15 Wall., there was a garnishment, the garnishee appeared, made himself a party to the proceeding, and there was a decree against him. Here the corporation of Alexandria was not made a party to the suit; never had any process served upon it, nor was brought in in any way. *Alexandria* had no interest except as a debtor. In *Tyler* v. *Defrees*, 11 Wall., the special verdict *found that the property had been seized* by the marshal, and after the libel a judicial warrant of arrest had been issued to the marshal, and the court say *no further seizure* was needed, the property was *already* in his hands. Here there was neither seizure of the evidences of the debt, nor of the debt, there being no legal notice to the corporation of Alexandria.

It makes no difference what the corporation called these bonds. In law they are bonds, and nothing else, not promissory notes, not single bills nor stock; and in the severe proceeding of libelling property for confiscation, to be taken without actual notice to the owner, it will not do to say, in describing the property you can use "equivalent expressions." "Stock" is not an equivalent expression to bonds; there should be a description as *accurate* as *possible*. You could not sell one hundred barrels of whiskey under a libel and proceedings against a hundred cases of cigars. In this case the district attorney had the means at hand when he filed his libel of accurately describing these bonds.

3. The rule and practice of the United States district courts for Virginia at that time, refusing "rebels" a hearing, the law

as laid down by the court, "denying," as we state in our petition, to Dr. Fairfax "*the rights and immunities guaranteed to him by the constitution and laws of the United States*," renders *null and void* the proceedings in the libel suit (*Mc Veigh* v. *U. S.*, 11 Wall. 259; *Underwood* v. *Mc Veigh*, 23 Grattan; *Lasere* v. *Rochereau*, 17 Wall.). As we have said, the law does not require the doing of a nugatory act, as Dr. Fairfax's attorney would have been doing had he presented himself a fourth time in that court to defend his client's rights, after the district judge had three times refused Dr. Fairfax, in similar case, a rehearing—(*Tacey* v. *Irwin*, 18 Wall. 551). As to the argument that *Tacey* v. *Irwin* does not apply here, the tax commissioners of the United States not being judicial officers, and their acts not being *res judicatæ*, it appears from the act appointing those commissioners (see the act of congress appointing them, June 7th, 1862, sections 8, 9 and 13), that they were *quasi* judicial officers—officers from whose decisions appeals could be taken to the United States district court. In *Clinkenbeard* v. *U. S.*, 21 Wall, page 70, the United States supreme court say, that "the decision of an assessor or board of assessors, like those of all other administrative commissioners, are of a *quasi* judicial character, and cannot be questioned collaterally, when made within the scope of their jurisdiction"—applying the rule of law as to judicial decisions to the decisions of similar commissioners to the tax commissioners under the act of June 7, 1862, on the ground of their being *quasi* judicial officers.

The highest character of trust is the judicial trust, the trust reposed by the citizens in the judiciary, to which they confide their lives, liberty and property. Where the judge is faithless, where he violates the common obligation mutual between himself and the citizen—where in his court he denies to the citizen the rights and immunities guarantied to him by the constitution and the laws, the character of such acts has been vividly portrayed by the United States supreme court.

It is in the nature of a fraud to enter such a decree against a party who had not an opportunity to be heard upon the merits.

JOHN JOHNS, JR.,
C. W. WATTLES,
For the defendant in error.

In the Supreme Court of the United States,

CITY COUNCIL OF ALEXANDRIA, *Plaintiff in Error,*
vs.
ORLANDO FAIRFAX, *Defendant in Error.*
} No. 705.

In Error to the Supreme Court of Appeals of Virginia.

BRIEF OF C. W. WATTLES AND JOHN JOHNS, JR.,

Counsel for Defendant in Error.

To the Honorable Justices of the Supreme Court of the United States.

REPLY TO THE BRIEF OF PLAINTIFF'S COUNSEL.

Bell's Potomac Press, Alex'a, Va

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REPLY TO THE BRIEF OF PLAINTIFF'S COUNSEL.

THE facts of the case are as follows:

Dr. Orlando Fairfax, the defendant in error, resided in Alexandria, Virginia, before the late war. At the breaking out of the war, he removed to Richmond, Virginia, where he has since resided.

He was the holder and owner of $8,700 of the bonds of the City of Alexandria, the certificates of which indebtedness, under seal, he carried with him to Richmond, and still holds them.

February 24th, 1864, a libel was filed in the District Court for the Eastern District of Virginia, under the acts of Congress of August 6, 1861, and July 17, 1862, to confiscate, condemn and *sell* the stock of the Corporation of Alexandria held by Dr. Fairfax, on the ground that the defendant in error was a "rebel" and "traitor."

Under these acts of Congress, the President of the United States was required to cause the seizure of such property by *proper process.* Judgment of condemnation was rendered by the said District Court, as if by default, May 4th, 1864, and the stock aforesaid was sold by the Marshal for the gross sum of $1,737, and transferred to the purchaser by the said Marshal on the books of the Auditor, without any order of the said Court for the purpose—*the bonds sued on at no time being in his possession.*

The President of the United States charged the Attorney General with the duty of giving to the District Attorneys such instructions as were necessary to carry out the provisions of said acts.

Among the instructions was one to this effect: That when the *State law* prescribed the method of seizure, and the act of Congress prescribed none, the State law should be conformed to by the Marshal, as nearly as may be, consistently with the act of Congress.

Without these instructions, the District Attorney had no authority to act. The subject of the seizure in this case being *a credit*, the mode of seizure under the State law was that in regard to attachments; and the debtor being a Corporation, the State law prescribed that notice to it should be served on its Mayor, &c. &c. See *Judge Moncure's Opinion, Record, top paging* 24 *to* 32. As to the law of attachments, *top page* 26. The service was on the Auditor, an officer not enumerated in the law, and therefore void.

There were three other cases of confiscation against the property of the defendant in error, in the same Court, between the 10th March and 4th May, 1864, in which judgments of condemnation were rendered. An attorney attempted to appear in each of these three cases, and the Judge (John C. Underwood) announced from the Bench that he would allow no appearance for any rebel or traitor; that this was the rule of his Court, as before that publicly announced; and that he had in every case ordered the appearance of counsel for, and the answers of, "*rebels,*" to be stricken from the files. This rule was enforced in all three of these cases against the defendant in error, because he was in the Confederate lines; and he did not attempt to appear in this case because of the existence of this rule and its enforcement against him in the other three cases. See "*Case Agreed,*" *top page* 10 *of Record.*

The defendant in error, the said Orlando Fairfax, brought suit after the war, on the said bonds, against the plaintiff in error, in the Circuit Court for the City of Alexandria, and failed to recover in that Court; whereupon the defendant in error applied for and obtained a writ of error from the Supreme Court of Appeals to the said Circuit Court. The Court of Appeals reversed the Circuit Court, and rendered judgment for the defendant in error. From this judgment the plaintiff in error has appealed to this Court.

The Federal question here is, Does the Record show an effective confiscation of the property sought to be condemned and sold by the sentence of the District Court?

It is true that the record of confiscation comes under consideration collaterally; but who produces it? Not the purchaser of the property, whose title is not attacked, but the *debtor*, the obligations referred to still being in the possession of the holder, and unpaid.

It is conceded that if the Court had no jurisdiction, its decrees, orders, and the action of its officers, were mere nullities, to be attacked either directly or collaterally.

The City Council of Alexandria was not a party or privy to the confiscation record; it was not even served with notice of the garnishment; for service on R. Johnston, Auditor, is no good service on the Corporation. See *Code of Virginia*, 1860, *page* 707, *chap.* 170, *sec.* 7. The service should have been on the Mayor, &c, &c., and not the Auditor, who had no interest to defend the garnishment, *and was not authorized by law to appear to the process.* See *Judge Moncure's Opinion, page* 24 *of the Record.*

The jurisdiction of the Court depends entirely on a valid seizure. Was there such a seizure?

We say not, and rely on the case of Miller *vs.* U. S., 11*th Wallace*, 268. Mr. Justice STRONG, who delivered the opinion of the Court, holds that all subjects incapable of *manu-caption*, such as *stocks* and *credits*, should be seized by way of attachment, and that notice must be given to the *debtor* or *holder*. In this case, the City was the *debtor* of Fairfax. Unless such notice is given, there is no *seizure;* and *seizure* is essential to the jurisdiction of the Court. Service on the Auditor, as already remarked, *was no service at all*, either by statute. rules in admiralty, *or by* virtue of the President's instructions. See Miller's case, 11 *Wallace*, 274.

If attachment was the mode of seizure, the law of the State should have been strictly followed ; but on the contrary, it was wholly disregarded. The sale was not even confirmed, and there was no order of Court directing the Marshal to make the transfer to the purchaser.

The final order is : " Sell the said property for cash to the highest bidder, and *execute a deed for the real estate to the purchaser*, and bring the proceeds of said sale into this Court for its action thereon."

The Court does not prescribe the mode of seizure by its warrant, (for proper warrant, judicial, there is none) and does not direct how the transfers of "*stock*" shall be made, &c. ; *but provides for the conveyance of real estate.* The Court, therefore, abandons its jurisdiction, if it ever had any, over the personalty, and directs the sale and conveyance of real estate.

This order, we contend, is destructive of the Court's jurisdiction, even if no warrant of arrest were necessary.

In Brown *vs.* Kennedy, 15 *Wallace, page* 591, the case of Pelham *vs.* Rose is referred to, where the Court took a distinction between a promissory note, the evidence of a "*credit*," and the *credit* itself, and held that the *note*, the *thing* proceeded against, should have been seized by the Marshal and taken in possession. This distinction was not lost sight of in the subsequent cases. See Pelham *vs.* Way, 15 *Wallace, page* 196. In the case at bar, nothing was taken into possession by the Marshal. "*Stock*" of the Corporation of Alexandria, a thing which did not exist, was proceeded against by libel and seized, if any thing, by the Marshal. The "debt" or "credit" is no where mentioned in the proceedings. This, we contend, is fatal to the jurisdiction of the Court.

If a "credit," which it certainly was, it should have been proceeded against by way of garnishment. It could not be proceeded against as "*stock*," for *none such* was in existence ; and it is a mere pretence to call it so.

In Brown *vs.* Kennedy, a "*credit*" was attached; Kennedy, the debtor, was served with notice, and appeared *as a party to the proceedings.* Time was given him to pay the debt, and in default of his paying, the decree provided that the land mortgaged to secure the debt should be sold. At the time appointed Kennedy paid the money into Court for the use of the United States, and his land was released by operation of law. A bill in chancery was then filed by Brown *vs.* Kennedy to fore-

close the mortgage, and Kennedy produced the confiscation record as his defence. The Court below and the Supreme Court of the United States sustained the defence, and ordered the bill to be dismissed. The confiscation record shows that Brown applied to the Court for the money paid by Kennedy, which was still under its control; that the District Court refused the prayer, but that on appeal the Circuit Court granted it. Brown, by this proceeding, waived all recourse against Kennedy, and his debt was settled by the decree in his favor In the confiscation case all the parties appeared; Brown the creditor, Kennedy the debtor, and the United States; Brown intervened by way of petition, and submitted to the jurisdiction of the Court; therefore there could be no question of jurisdiction properly raised. (A copy of the full record is presented with this argument.)

In the above case, Brown *vs.* Kennedy, a warrant of arrest was issued, and the return of the Marshal showed *seizure* of "*the credit.*" All rules were followed, and all parties bound.

If beyond the territorial jurisdiction, as in the case before the Court, no seizure could be made, except by attachment. This is conceded by all of the cases.

The theory in admiralty is, that the *Res* commits the offence, and the proceeding is not against the owner, but the thing. How could the *Res*, in this case, commit the offence ? It is an impossibility. Dr. Fairfax was beyond the Federal lines, and no use of the "stock," as it is erroneously called, could be made, either for his own use or to give aid and support to the enemy.

It must be remembered that in the confiscation of personal property, the entire ownership is divested; and not so in regard to real estate, where only the life estate is affected.

This being so, there is a much stronger reason that all the forms of law should be strictly followed in the confiscation of personal property, as it works a perfect forfeiture.

We say, then, that the forms of law *were not* followed, to give jurisdiction to the Court, which, in the language of the Supreme Court of the United States, is essential to a valid decree of confiscation and forfeiture. In fact, no law was followed and no decree observed; for the process was served on the Auditor, and the decree was to make conveyance of real estate.

The case of Miller, in 11*th Wallace*, may appear to be in conflict with Pelham *vs.* Rose, 9*th Wallace*, but they can be easily reconciled. The order in Pelham *vs.* Rose was to seize *the promissory note*, which could not be done, the *Res* being beyond the jurisdiction of the Court; "the credit" was not reached by the proceeding. and therefore nothing was confiscated. In Miller's case, "*stock*" was seized by way of attachment, and the proper form followed to make it effective.

For sake of the argument, let us concede that the *Res*, in this case, was "stock."

The Supreme Court of the United States decides that, if such, it should be pursued by way of attachment, and that the State law should be followed. See Miller's case, 11 *Wallace*, and Judge DAVIS' Opinion, *page* 330.

We have already shown that no law was followed.

We do not pretend to traverse the return of the Marshal; on the contrary, we take it to be true; and in admitting it to be true, lies the strength of our argument on the question of seizure.

The City Council of Alexandria did not answer the process of garnishment, nor was it required to answer, by rule or otherwise. In fact, it had no notice, as the Marshal, by his return, plainly shows. In the case before the Court, there was no judicial warrant to seize or attach any thing. The Marshal merely notified the Auditor, and the Court proceeded to sentence against a *nonentity*.

That which did not exist could not be seized; and the Marshal's return must refer to the antecedent proceedings, which were to libel and seize 87 shares of the "*stock*" of the Corporation of Alexandria—(see *page* 10 *of printed Record*)—a thing not in existence; for the obligations sued on and attempted to be attached are mere *bonds* or *evidences of debt*.

The Marshal, by his return, shows how he executed the writ; and nothing is left to inference. It is plain that he did not seize the *Res*, in accordance with the rules of law. We insist, therefore, that the case of Brown *vs.* Kennedy is for us. The Auditor had no authority to transfer the bonds. It was his office merely to register the transfer, after it had been made by the owner.

In Miller's case, the notice of attachment was served upon the pro-

per officer. The recognition of the transfer cannot affect, in any manner, the rights of the plaintiff. The recognition may have been a fraudulent act; and we are entitled to say that it was, as no effort was made by the City to intervene for the protection of its creditor.

Counsel for the City refers to 11*th Wallace, page* 298. The authority is for us; for the Court say that the attachment should be by notice to the debtor; and no such notice was given in this case. The only process ordered by the Court was the process of monition. There was no warrant of seizure, which is the kind of writ alluded to in the case of Miller. A monition is simply a summons to appear, the foundation of proceedings thereupon to be had; but the record is fatally defective if it does not show that the monition was followed up by proper judicial action.

There was no ratification of the Marshal's action; for the sale was not confirmed, and no order was taken as to the mode of transfer.

As contended by the City's counsel, it is true that when the Court has once jurisdiction, the regularity of the proceedings cannot be inquired into, in a collateral suit. The rule applies to Courts of general jurisdiction, as all State Courts of record *generally are.* The Courts of the United States are of limited jurisdiction, under the Constitution, and it is beyond the power of Congress to erect Courts of general jurisdiction. (See 5 *Cranch*, 173 and 185, Kempe's Lessee *vs.* Kennedy.) The confiscation in this case was in a State Court of general jurisdiction.

In Courts of limited jurisdiction, jurisdiction should appear on the face of the record. If the record shows not only a want of jurisdiction, but an erroneous decree or sentence, the judgment is a nullity. And why? Nothing is presumed in favor of a record which condemns itself. These remarks are intended to be particularly applicable to Courts of limited jurisdiction.

We have already attempted to show that the District Court never acquired jurisdiction; but admitting that it had, we contend that we are in no manner concluded by the record; for it is plain that the City was not a party or privy to it; that it was not summoned as garnishee, and was not required to answer. At all events, the City did not become a party by any action on its part.

In the cases referred to, the suits were brought against the purchasers, and not against the original debtor, except in the case of Brown *vs.*

Kennedy, where all the parties appeared, and every step taken was regular.

Counsel for the City concede that if a warrant of arrest or "seizure" were necessary, and none being prayed for or ordered, no jurisdiction over the *Res* attached to the Court. To show that no such warrant was necessary, they rely on the case of Tyler *vs.* Defrees, 11 *Wallace*, 331. In this case the Marshal seized real estate It was within the territorial jurisdiction of the Court, and could not be *eloined*, nor in any manner could the United States or the Marshal be dispossessed of it. The Marshal returned the fact of seizure, and held the property subject to the future order of the Court. No such return appears in the case before the Court. He returns that he had seized that which did not exist, and gives notice to a stranger. The order of the Court in Tyler *vs.* Defrees followed the return of the Marshal. In the case *here*, the final order followed nothing that had preceded it. The rules laid down by Judge MILLER apply strictly to property which is within the jurisdiction of the Court, capable either of *manual possession or immovable.* (See 348, 11 *Wallace.*)

We have shown that in regard to "*stocks*" and "*credits*," the process of attachment and garnishment must be followed, and that no effective seizure can be made unless the law is complied with. The case above referred to only decides that in case of real estate and personal property capable of *manu-caption*, a different rule applies.

The Marshal also added the important fact in his return, *that he held the property subject to the order of the Court.* (See *p.* 347, 11 *Wallace.*) The real estate of Tyler was in the possession of the Government, and under the control of the Court, from the commencement of the proceedings. An order to seize it was all that was necessary to give jurisdiction to the Court, if, upon a return of the process, such property was found liable to confiscation. It was for the Court thereafter, upon a proper return, to pronounce sentence; and its final order, in regular proceedings, would be equivalent to a warrant of arrest and condemnation, in cases of tangible personal property over which a Court of Admiralty has jurisdiction.

The Marshal was the executive officer of the Court, and took possession of the *Res* in the only manner he could, and held it for further proceedings.

In the present case, the Marshal never had possession of the plaintiff's *bonds*, as we insist they were ; for the fact appears that they were under the control and in the possession of Fairfax at the time of the libel, and have continued in his possession ever since.

Now as to the question, What was, if any thing, seized? Counsel for the City say, "87 *shares* of the stock of the Corporation of Alexandria, and the *dividends thereon.*" *They are mere bonds*, certificates of indebtedness, under the corporate seal of the City Council of Alexandria. There is no more power in the Corporation to create "*stock*" than in a natural person. Calling it "stock" by an ordinance of this City, *does not make it so ;* and if it be "*stock*" we must fail in our form of proceeding, for a Corporation cannot be sued at law for the value of its stock ; it may be for the accrued dividends.

In this case, the action was covenant on bonds. If the plaintiff had produced "stock" in evidence, the Court would have ruled out the testimony, and thus the case would have ended.

In fact the obligations are interest-bearing bonds, which may be sued on at law at maturity by the holder ; and instead of a sale after attachment, a judgment should have been taken for the amount of the bonds, against the Corporation, according to their tenor, as in the case of Brown *vs.* Kennedy, and the proper time given to pay, if not due.

We contend, therefore, that nothing was seized, in any shape. "Stock" and dividends were attempted to be seized ; the bonds we sue on bear interest at the rate of six per cent. per annum, were given for money borrowed, and it was beyond the power of the Corporation to stamp them "*stock*" by legislation.

"*Stock*" of a municipal corporation cannot exist, for there is no power to create it. Who are the stockholders ? Where are the joint assets? And under what sort of authority, at law or in equity, could a *stockholder* proceed to wind up the Corporation ?

If interest on its obligations be not paid, the holder may sue, recover judgment, issue execution, and make his money. if property of the Corporation can be found. If the bonds have matured, he may sue for the principal. If his execution is unavailable, his only recourse is to apply for a mandamus, to compel the City Council to levy a tax to meet the demand. No bill in equity to settle the affairs of the Corporation and divide its assets would lie, because there are no assets to divide, and

if there were, no *stockholders* to invoke the interposition of the Court. "*Stock*" of municipal Corporations is not the proper legal definition of its obligation. They are often erroneously called so, and may be so "*known to the commercial world;*" but Courts of law are required to treat them according to their legal effect. Any stamp *may* have been put upon the obligations, to suit the fancy of the obligors. Suppose, for instance, they had been stamped "Bills of Exchange," would that have changed their legal effect, and made them negotiable by delivery? No.

We urge nothing further in answer to this branch of the defendant's printed argument.

The case is submitted to the Court on the *Present Record*, and *not* on the confiscation proceedings alone. The Record must be taken as a whole transcript of what was considered in the Court below. Therefore there is nothing *dehors* the Record, and nothing presented *aliunde*.

Questions of this kind can only be reserved by exceptions. An "*agreed case*" shuts them out, as it is in the nature of a *stipulation* to bring all matters in controversy before the Court for adjudication. The principle may be well illustrated by the case now before the Court.

An action of covenant was instituted by Orlando Fairfax against the City Council of Alexandria, on several *writings obligatory* of said City, which on their face bore the inscriptions of "stock," though they were mere Due Bills under seal, bearing interest, &c.; and the draughtsman of the declaration used the word "*stock*" merely as descriptive of the obligations, and not as descriptive of their nature or legal effect. In fact it was surplusage, and may have been omitted without prejudice to the pleadings. Moreover, after a "*case agreed,*" the pleadings are not subject to review.

At the trial, Fairfax, the defendant here in error, might have objected to the introduction of the *Confiscation Record*, on the ground of variance, for the proceedings before the District Court of the United States were against "stock"—not "bonds." But, to avoid delay and embarrassment at the trial, the parties agreed to submit all the facts of the case, to be passed upon finally by the Court.

It appears from the present Record, that Judge J. C. Underwood, by whom the confiscation was attempted to be made, refused to allow an appearance for any rebel or traitor for any purpose.

The proof of his conduct has been admitted, and its legal effect must

follow. The Court refused an appearance, and no exceptions could be made to *his* action by the party most interested ; for the book was closed and clasped by the hand of arbitrary power. No questions of error could be reserved, no point controverted, and no law, except the will of the Judge, administered, as the *Rule* excluded all defence or effort to defend. A motion to take exceptions would have been treated with contempt, and perhaps the Attorney making the motion sent to jail for contumacy.

The parties here are bound by the legal effect of the entire Record. It cannot be split up or divided into parts, to affect questions presented by it. If the District Court ever acquired jurisdiction, which we deny, it was continued and held to commit wrong and oppression.

The conduct of the Court was a flagrant usurpation of power, which rendered its decree a nullity and jurisdiction a sham. This commentary is far short of the censure contained in Mr. Justice SWAYNE'S Opinion in McVeigh *vs.* United States, 11*th Wallace, page* 257.

We contend, also, that the principles decided in Tacey *vs.* Irwin, 18 *Wallace*, apply to this case, and ought to be conclusive to establish the right of the plaintiff.

The Tax Commissioners were clothed with judicial powers They were not mere ministerial officers ; for parties within a certain time were allowed to intervene to save sale and forfeiture. It was a *special Court*, erected by Congress for the purpose indicated by the act.

Counsel for Defendant have seriously insisted that the District Court had *general* jurisdiction over cases in confiscation. We have already shown that Congress has not power to erect Courts of general jurisdiction for any purpose. In fact, the District Court, as a Court of Admiralty, was made a "*Special Confiscation Tribunal*," and, in case of default, entered its decrees without inquiry. The Tax Commissioners did the same ; that is, ordered the land to be sold, and executed a deed or certificate to the purchaser. Redemption within a certain time was secured by the act, and the Commissioners were the *Judges* to determine the rights of parties interested in the land. The Tax Commissioners committed gross error in adopting an arbitrary rule, and so did Judge Underwood in the present case.

We say then that in both instances a judicial *fraud* was perpetrated

to be remedied by remitting parties to their legal rights and appropriate forms of action.

Judge MONCURE, of the Supreme Court of Virginia, in his Opinion, refers to the case of Windsor *vs.* McVeigh, lately decided by this Court. The "agreed case" presents the identical question, touching the conduct of Judge John C. Underwood, passed upon by the Supreme Court, as the arbitrary *Rule* of his Court, applied to all cases of like nature which came before him for trial and adjudication The *Rule* denied to the defendant in error "*the rights and immunities guaranteed to him by the Constitution and laws of the United States,*" and therefore nothing was concluded against him by operation of the *Rule.* (McVeigh *vs.* United States, 11 *Wallace*, 259. Lasere *vs.* Rochereau, 17 *Wallace*, 437.)

No question arises here as to the constitutionality of the confiscation acts; but they are extremely penal, and ought to be construed strictly; and a rigid compliance with all requirements ought to be exacted.

The above is the opinion of the Supreme Court of Appeals of Virginia, and it is endorsed by Mr. Justice MILLER, in Tyler *vs.* Defrees, 345; for it cannot be said that he has, in the language of counsel, expressed a different "*sentiment.*" It is substantially the same, for Justice MILLER well says that the Court is to be governed by reasonable and sound rules, applicable to analagous cases in the Courts, &c. &c.; but he does not say that the Court should be governed by arbitrary and oppressive rules, made by its own will, and acted upon to the destruction of all rights, remedies and immunities. We see no contrast between the opinions of Judge MONCURE and Mr. Justice MILLER; but on the contrary, they are in strict accord. The judicial mind may properly use the words "sound" and "reasonable," for no better language can be used to express determination to arrive at a just conclusion.

Referring to our Brief, submitted on the motion to dismiss the writ of error, as containing some points not made in this argument on the merits, we respectfully submit the case to the judgment of the Court.

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